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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURTS OF COMMON PLEAS,
AND
EXCHEQUER CHAMBER,
AND IN THE
HOUSE OF LORDS:
FROM
MICHAELMAS TERM 40 *GEO.* III. 1799,
TO
MICHAELMAS TERM 42 *GEO.* III. 1801,
BOTH INCLUSIVE.
With Tables of the Caſes and Principal Matters.

By JOHN BERNARD BOSANQUET, OF LINCOLN'S INN, Eſq. BARRISTER AT LAW. and CHRISTOPHER PULLER, OF THE INNER TEMPLE, Eſq. BARRISTER AT LAW.

> *Ut non difficile ſit, quæcunque nova cauſa, conſultatiove acciderit, ejus tenere jus.*
> CIC. DE LEG.

VOL. II.

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JUDGES
OF THE
COURT OF COMMON PLEAS,
During the Period contained in this Volume.

Right Honourable JOHN Lord ELDON, Lord Chief Juſtice, made Lord High Chancellor *Hilary* Vacation 1801, reſigned the ſituation of Chief Juſtice *Eaſter* Vacation 1801.

Right Honourable RICHARD PEPPER Lord ALVANLEY, Lord Chief Juſtice, appointed *Eaſter* Vacation 1801.

Honourable Sir FRANCIS BULLER, Bart. died *Eaſter* Vacation 1800.

Honourable JOHN HEATH, Eſq.

Honourable Sir GILES ROOKE, Knt.

Honourable Sir ALAN CHAMBRE, Knt. appointed *Eaſter* Vacation 1800.

A

TABLE

OF THE

NAMES OF THE CASES

Reported in this Volume.

N. B. *Thoſe Caſes, of which the Names are printed in Italics with the letter* n. *added to the figures denoting the pages, were cited from MS. notes.*

A

ABERCROMBIE *v.* Parkhurſt *Page* 480
Adams (Dicker *v.*) 163
Alan (Steel *v.*) 362. 437
Alderton (Harrow School *v.*) 86
Allingham *v.* Flower 246
Amatt (Cartwright *v.*) 43
Ames *v.* Hill 150
Anderſon *v.* Pitcher 164
——— *v.* May 237
Armytage (Jones *v.*) 38
Arrowſmith (Wallace *v.*) 49
Aſtley *v.* Weldon 346
Atkinſon *v.* Newton 336
Attorney General v. *Bowman* 532. *n.*
Aubert *v.* Maze 371
Aukland Lord (Lord Petre *v.*) 139
Audley *v.* Duff 111

B

Baddam (Doe d.) *v.* Roe *Page* 55
Badtitle (Goodtitle d. Wanklen *v.*) 120
Bagott *v.* Orr 472
Bailey *v.* Hantler 126
Baker (Handcock *v.*) 260
Ball (Mills *v.*) 457
Bamford *v.* Burrell 1
Banks (Doe d.) *v.* Booth 219
Banning *v.* Perry 69
Bargus (Holin *v.*) 42
Barnes (Vaughan *v.*) 392
Barnfield (Doe d.) *v.* Wetton 324
Barret (Nation *v.*) 30
Barter (Seale *v.*) 485
Bayley (Walker *v.*) 219
Baylis (Parker *v.*) 73
Beard *v.* Webb 93

Bell *v.* Da Coſta *Page* 446
Bennett *v.* Francis 550
Biſhop *v.* Young 78
Blakey *v.* Dixon 321
Bolt (*v.* Miller) 420
Bolton (Long *v.*) 209
Booth (Doe d. Bankes *v.*) 219
Bowes *v.* Bowes 500
Bowman (*Attorney General* v.) 532 *n.*
Boxall (Iſles *v.*) 89
Brant (*Langloie* v.) 433 *cit. in notis.*
Brigden *v.* Parkes 424
Briſtow (Turner *v.*) 38
——— (Waddington *v.*) 452
Bromley *v.* Coxwell 438
Brooker *v.* Simpſon 336
Broomhead (Redit *v.*) 564
Brown *v.* Kewley 518
Browning *v.* Wright 13
Bruce v. *Bruce* 229 *n.*
Earl of Buckinghamſhire (Goodright *ex dim.*) *v.* Marquis of Downſhire 600
Burgeſs *v.* Freelove 425
Burrel (Bamford *v.*) 1
Butler (Singleton *v.*) 283
Butterfield (Williamſon *v.*) 63

C

Cadell (Murphy *v.*) 137
Cartwright *v.* Amatt 43
Caſtle (Pariente *v.*) 163
Caſtleman *v.* Ray 383
Cator *v.* Hoſte 557
Chapman (Ruſhton *v.*) 340
Chaters (Gibſon *v.*) 129
Chatterley *v.* Finck 390
Chippendale Davis *v.*) 282. 367
Chriſtie (Watſon *v.*) 224
——— (Fawcett *v.*) 515
Clarke (Da Coſta *v.*) 257. 376
Clempſon *v.* Knox *Page* 516
Coare (Foott *v.*) 588
Coker *v.* Guy 565
Coleman (Howell *v.*) 466
Cook *v.* Loveland 31
Couſins (Miller *v.*) 329
Cowell *v.* Edwards 268
Cox *v.* Morgan 398
Coxwell (Bromley *v.*) 438
Cunningham *v.* Mackenzie 598

D

Da Coſta *v.* Clarke 257. 376
——— (Bell *v.*) 446
Daniel (Scholey *v.*) 540
Danvers (Stevenſon *v.*) 109
Darley (Engliſh *v.*) 61
Davenport (Davis *v.*) 72
Davis *v.* Davenport *ib.*
—— *v.* Chippendale 282. 367
—— (Elliot *v.*) 338
Deering Sir Edw. *v.* Earl of Winchelſea 270
Denn d. Mellor (Moore *v.*) 247
De Symonds *v.* Shedden 153
Dicker *v.* Adams 163
Dixon (Blakey *v.*) 321
—— *v.* Dixon 443
Doe d. Baddam *v.* Roe 55
—— Banks *v.* Booth 219
—— Barnfield *v.* Wetton 324
—— Planner *v.* Scudamore 289
Donelly *v.* Dunn 45
Dowſe *v.* Reeve 578
Dowland (Slade *v.*) 570
Downſhire Marquis of (Goodright *ex dim.* the Earl of Buckinghamſhire *v.*) 600
Duff (Audley *v.*) 111

Duff (Long *v.*) *Page* 209
Dunmore (Robinſon *v.*) 416
Dunn (Donelly *v.*) 45

E

Eccles (Hawkins *v.*) 359
Edwards (Cowell *v.*) 268
Eggington (Rex *v.*) 508
Elliot *v.* Davis 338
Engliſh *v.* Darley 61
Evan Evans (Ex Parte) 88
Everard *v.* Hollingworth 111 *in notis.*

F

Fail *v.* Pickford 234
Faulkner *v.* Wiſe 150
Fawcett *v.* Chriſtie 515
Federici (Stacey *v.*) 390
Ferrars (Roe d. Pallatt *v.*) 542
Finck (Chatterley *v.*) 390
—— (Hollings *v.*) *ib.*
Flower (Allingham *v.*) 246
Foott *v.* Coare 588
Fowler *v.* Morton 48
Frame (Parry *v.*) 451
Francis (Bennet *v.*) 550
Freelove (Burgeſs *v.*) 425
Freeman (Scurry *v.*) 381
Fry (Page *v.*) 240
Fullerton (Powell *v.*) 420

G

Garnham *v.* Hammond 298
Gibſon *v.* Chaters 129
Gilbert (Wilſon q. t. *v.*) 281
Goldſmid *v.* Taite 55
Goodtittle d. Wanklin *v.* Badtitle *Page* 120
Goodright ex dim. Earl of Buckinghamſhire *v.* the Marquis of Downſhire 600
Govett *v.* Johnſon 465
Gray *v.* Pindar 427
Green (Pilkington *v.*) 151
Grigby *v.* Oakes 526
Groote (Tatterſall *v.*) 131. 253
Guy (Coker *v.*) 565

H

Halford (Hill *v.*) 413
Hall *v.* Ody 28
—— (Maria *v.*) 236
Halſey (Knight *v.*) 172
Hammerſley *v.* Mitchell 389
Hammond (Garnham *v.*) 298
Handcock *v.* Baker 260
Hantler (Bailey *v.*) 126
Harris (Ward *v.*) 265
—— (Wilſon *v.*) 320
—— *v.* Manley 526
Harrow School *v.* Alderton 86
Hartſhorn *v.* Slodden 582
Hawkins *v.* Eccles 359
Hector (M'Connel *v.*) 549
Herbſt (Soilleux *v.*) 444
Heſeltine (Wheeler *v.*) 560
Hifferman *v.* Langelle 363
Hill (Ames *v.*) 150
—— *v.* Halford 413
—— *v.* Humphreys 343
Holin *v.* Barguſs 42
Holland *v.* White 341
—— *v.* Hopkins 243
Hollingworth (Everard *v.*) 111 *in notis.*
Hollings *v.* Finck 390

Hopkins (Holland *v.*) *Page* 243
Holmes *v.* Wennington 399. *n.*
Hoſier *v.* Searle 299
Hoſte (Cator *v.*) 557
Howell *v.* Coleman 466
Humphreys (Hill *v.*) 343
Huntley *v.* Luſcombe 530
Hurry *v.* Royal Exchange 430
Hutchinſon (Marſh *v.*) 226

I

Iles *v.* Boxall 89

J

Jackſon (Saunderſon *v.*) 238
Johnſon (Tipping *v.*) 302. 357
——— (Govett *v.*) 465
Joliffe (*Milbank* v.) 580. *n.*
Jones *v.* Armytage 38
Jordan (Thompſon *v.*) 137
Jory *v.* Orchard 39

K

Kennedy (Martin *v.*) 69
Kerr *v.* Sheriff 358
Kewley (Brown *v.*) 518
Kidd *v.* Rawlinſon 59
Knight *v.* Halſey 172
Knox (Clempſon *v.*) 516

L

Lacy (Rodgers *v.*) 57
Laing *v.* Raine 85
Lambert (North *v.*) 218
Lands (Salkeld *v.*) 416
Langdale (Morris *v.*) 284
Langelle (Hifferman *v.*) *Page* 363
Lawley (Thompſon *v.*) 303
Langloie v. *Brant* 433 *cit. in notis.*
Lawſon *v.* M'Donald 590
Lechmere *v.* Rice 12
Lee (Penſon *v.*) 330
Lees *v.* Warlters 465
London Aſſurance Company (Rucker *v.*) 432 *n.*
Long *v.* Bolton 209
—— *v.* Duff *ib.*
Loveland (Cook *v.*) 31
Luſcombe (Huntley *v.*) 530

M

Mackenzie (Cunningham *v.*) 598
Mainwaring *v.* Newman 120
Manly (Harris *v.*) 526
Mann *v.* Sheriff 355
Maria *v.* Hall 236
Marſh *v.* Hutchinſon 226
Martin *v.* Kennedy 69
May (Anderſon *v.*) 237
—— (Whitbread *v.*) 593
Maze (Aubert *v.*) 371
M'Connell *v.* Hector 549
M'Donald (Lawſon *v.*) 590
Meagher *v.* Vandyke 370
Mears (Parke *v.*) 217
Mellor Denn d. (Moore *v.*) 247
Meſſenger (Price *v.*) 158
Millbank v. *Joliffe* 580 *n.*
Miller *v.* Couſins 329
—— *v.* Bolt 420
Mills *v.* Ball 457
Mitchell (Hammerſley *v.*) 389
Moffatt v. *Van Millingen* 124 *n.*
Monſieur de France (Sinclair *v.*) 363
Moody *v.* Pheaſant 446

Moore *v.* Denn d. Mellor *Page* 247
Morgan (Cox *v.*) 398
Morris *v.* Langdale 284
Morton (Fowler *v.*) 48
Motley et Ux. (ex parte) 455
Mountford *v.* Willes 337
Murphy *v.* Cadell 137

N

Nation *v.* Barrett 30
Newman (Mainwaring *v.*) 120
Newton (Atkinſon *v.*) 336
North *v.* Lambert 218

O

Oakes (Grigby *v.*) 526
Ody (Hall *v.*) 28
Onſlow *v.* Smith 384
Orchard (Jory *v.*) 39
Orr (Baggott *v.*) 472

P.

Page *v.* Fry 240
Pajot (Whaley *v.*) 51
Pariente *v.* Plumtree 35
——— *v.* Caſtle 163
Parke *v.* Mears 217
Parker *v.* Vaughan 29
———- *v.* Bayliſs 73
Parkes (Brigden *v.*) 424
Parkhurſt (Abercrombie *v.*) 480
Parry *v.* Frame 451
Payne *v.* Whaley 137
Pellatt Roe d. *v.* Ferrars 542
Penſon *v.* Lee 330
Perchard v *Whitmore* 155 *n.*
Perkins *v.* Pettitt *Page* 275. 440
Perring (Stovin *v.*) 561
Perry (Banning *v.*) 69
——— (Stanway q. t. *v.*) 157
Petre Lord *v.* Lord Auckland 139
Pettitt (Perkins *v.*) 275, 440
Pheaſant (Moody *v.*) 446
Pickford (Fail *v.*) 234
Pilkington *v.* Green 151
Pindar (Gray *v.*) 427
Pinero *v.* Wright 235
Pitcher (Anderſon *v.*) 164
Place (Wilton *v.*) 56
Planner (Doe d.) *v.* Scudamore 289
Plumtree (Pariente *v.*) 35
Powell *v.* Fullerton 420
Price *v.* Meſſenger 158

R

Radnor Earl of *v.* Reeve 391
Raine (Laing *v.*) 85
Randall (Tappenden *v.*) 467
Rawlinſon (Kidd *v.*) 59
Ray (Caſtleman *v.*) 383
Redit *v.* Broomhead 564
Reeve (The Earl of Radnor *v.*) 391
——- (Dowſe *v.*) 578
Rex *v.* Smith 127
—-- *v.* Eggington 508
Rice (Lechmere *v.*) 12
Robinſon *v.* Dunmore 416
Rodgers *v.* Lacy 57
Roe (Doe d. Baddam *v.*) 55
—-- d. Pellatt *v.* Ferrars 542
Royal Exchange (Hurry *v.*) 430
Rucker *v.* London Aſſurance Company 432 *n.*
Ruſhton *v.* Chapman 340

S

Salkeld *v.* Lands *Page* 416
Sankey (Shirley *v.*) 130
Saunderſon *v.* Jackſon 238
Savage (Whitfield *v.*) 277
Scales (Simpſon *v.*) 496
Scholey *v.* Daniel 540
Scudamore (Doe d. Planner *v.*) 289
Scurry *v.* Freeman 381
Seale *v.* Barter 485
Searle (Hoſier *v.*) 299
Sheddon (De Symonds *v.*) 153
Sheriff (Main *v.*) 355
——- (Kerr *v.*) 358
Shirley *v.* Sankey 130
Simpſon (Brooker *v.*) 336
——— *v.* Scales 496
———- (Sparkes *v.*) 379
———- (Vollum *v.*) 368
Sinclair *v.* Monſieur de France 363
Singleton *v.* Buttler 283
Skinner (Waterhouſe *v.*) 447
Slade *v.* Dowland 570
Slodden (Hartſhorn *v.*) 582
Smith (Rex *v.*) 127
——- (Onſlow *v.*) 384
——- *v.* Tyſon 339
——- *v.* Whalley 482
Soilleux *v.* Herbſt 444
Sparkes *v.* Simpſon 379
Spicer *v.* Teaſdale 49
Stacey *v.* Federici 390
Staines (Whitburn *v.*) 355
Stanway q. t. *v.* Perry 157
Steel *v.* Alan 362. 437
Stevenſon *v.* Danvers 109
Stovin *v.* Perring 561

T

Taite (Goldſmid *v.*) *Page* 55
Tappenden *v.* Randall 467
Tatterſall *v.* Groote 131. 253
Teaſdale (Spicer *v.*) 49
Thomas *v.* Ward 393
Thompſon *v.* Jordan 137
——— *v.* Lady Lawley 303
Thyatt *v.* Young 72
Tipping *v.* Johnſon 302. 357
Turner *v.* Briſtow 38
Tyſon (Smith *v.*) 339

V

Vandyke (Meagher *v.*) 370
Van Mildert (Wilſon *v.*) 394
Van Millingen (*Moffat* v.) 124 *n.*
Vaughan *v.* Barnes 392
——— (Parker *v.*) 29
Vollum *v.* Simpſon 368

W

Waddington *v.* Briſtow 452
Walker *v.* Bayley 219
Wallace *v.* Arrowſmith 49
Wanklen (Goodtitle d.) *v.* Badtitle 120
Ward *v.* Harris 265
—— (Thomas *v.*) 393
Warlters (Lees *v.*) 465
Waterhouſe *v.* Skinner 447
Watſon *v.* Chriſtie 224
Webb (Beard *v.*) 93
Weldon (Aſtley *v.*) 346
Wennington (*Holmes* v.) 399 *n.*
Wetton (Doe d. Barnfield *v.*) 324

Whaley *v.* Pajot *Page* 51
——— (Payne *v.*) 137
Whalley (Smith *v.*) 482
Wheeler *v.* Heſeltine 560
Whitbread *v.* May 593
Whitburn *v.* Staines 355
White *v.* Wilſon 116
——- (Holland *v.*) 341
Whitfield *v.* Savage 277
Whitmore (*Perchard* v.) 155 *n.*
Willes (Mountford *v.*) 337
Williamſon *v.* Butterfield 63
Wilſon (White *v.*) 116
—— q. t. *v.* Gilbert Clerk 281. 394
Wilſon *v.* Harris *Page* 320
Wilton *v.* Place 56
Winchelſea Earl of (Sir Edward Deering *v.*) 270
Wiſe (Faulkner *v.*) 150
Wright (Browning *v.*) 13
——-- (Pinero *v.*) 235

Y

Young (Thyatt *v.*) 72
——- (Biſhop *v.*) 78

ERRATA.

Page 50. note (*a*) line 6. *for* Le Blanc Serjt. *read* Le Blanc Juſt.
—— — — (*b*) — 18. *for* there *read* three
—— 51. — (*b*) — 25. *for* in the general iſſue *read* on the general iſſue
—— 73. line 38. in marg. *for* B. *read* A.
—— 86. note (*a*) *for* Reſt. Ent. *read* Raſtall's Entr.
—— 92. — (*a*) *for* pead *read* plead
—— 100. laſt line *for Leache*'s caſe *read Luch*'s caſe *Hob*. 247. and *dele* the note at the bottom of the ſame page.
—— 115. note (*a*) *for Luethſlier*'s caſe *read Lethbulier*'s caſe
—— 137. line 11. from the bottom *for* as it ſerved *read* as it was ſerved
—— 155. note (*a*) line 3. *after* inſurance *inſert* on goods
—— 176. — (*d*) *for Brown* P. C. *read* 5 *Brown* P. C.
—— 179. line 7. *for* Defendant *read* Plaintiff
—— 182. — 20. *for* former *read* farmer
—— 191. — 1. *for* conſcience *read* convenience
—— 257. — 4. in marg. *after* to *inſert* an avowry for damage feaſance
—— 273. — 7. for *quali* read *æquali*
—— 289. laſt line in marg. *for* recovery ſuffered *read* fine levied
—— 303. note (*a*) *for* Count *read* Court
—— 305. — (*a*) *for* if he had no leaſehold houſes *read* if he had no freehold houſes
—— 398. in marg. *for* 19 *Geo*. 3. *read* 19 *Geo*. 2.
—— 460. line 27. *dele* him at
—— —— — 28. *after* forwarded to *inſert* him at

IN the long Vacation Sir *John Scott* his Majeſty's Attorney General was appointed to ſucceed the late Lord Chief Juſtice EYRE in this Court, and was created a Peer of *Great Britain* by the title of Baron ELDON of *Eldon* in the county Palatine of *Durham*. His Lordſhip's promotion taking place during the Vacation, the 39 *Geo* 3. *c.* 113. was paſſed, authorizing his Majeſty when a vacancy happens on the Bench during the Vacation, to call any Barriſter to the degree of Serjeant, and appoint ſuch perſon to the Bench. Under this act, Lord ELDON was called and appointed. The motto on his rings was " *Rege incolumi mens omnibus una.*" On the firſt day of *Michaelmas* Term his Lordſhip took his ſeat in this court and the oaths.

Alan Chambre of *Gray's Inn* Eſquire, was alſo appointed one of the Barons of the Court of *Exchequer*, on the reſignation of Mr. Baron *Perryn*, and was knighted. His promotion, which took place previous to that of Lord ELDON, was alſo during the Vacation, and he was therefore called to the degree of Serjeant, under a particular act paſſed for that purpoſe (39 *Geo.* 3. *c.* 67.) and gave rings with this motto, " *Majorum inſtituta tueri.*"

Sir *John Mitford* his Majeſty's Solicitor General ſucceeded Lord ELDON as Attorney General.

William Grant Eſquire, the Chief Juſtice of *Cheſter*, was appointed Solicitor General, and was knighted.

ERRATA.

Page 50. note (*a*) line 6. *for* " Le Blanc, Serjt." *read* " Le Blanc, Juſt."
(*b*) — 18. *for* " there" *read* " three"
— 51. note (*b*) line 25. *for* " in the general iſſue" *read* " on the general iſſue"
— 115. note (*a*) *for* " Luethſlier's caſe" *read* " Lethulier's caſe."

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS

IN

Michaelmas Term,

In the Fortieth Year of the Reign of GEORGE III.

1799.

BAMFORD *v.* BURRELL.

Nov. 6th.

A debt accrued ſubſequent to an act of bankruptcy, and previous to the iſſuing of the commiſſion, is not barred by the certificate.

THIS was an action for goods ſold and delivered.

At the Sittings in *Michaelmas* Term 1797 a verdict was found for the Plaintiff on the plea of the general iſſue, and judgment was ſigned. Previous to this verdict, *viz.* on the 9th of *Auguſt* in the ſame year, a commiſſion of bankruptcy iſſued againſt the Defendant; and on the 4th of *December* following he obtained his certificate. In *Eaſter* Term 1798 the Defendant applied to the Court to order 48*l.* 12*s.* the debt and coſts in the above cauſe, paid into the hands of the ſheriff of *London*, by his bail, to be returned to them on payment of the coſts of a *ſcire facias* iſſued againſt them, to enter an *exoneretur* on the bail-piece *nunc pro tunc*, and to ſet aſide the judgment on the *ſcire facias*, on the ground of his having obtained his certificate before the return of any *ca. ſa.* iſſued againſt him before the bail were fixed. The Court at that time directed the parties to go to trial on the queſtion of bankruptcy, the Defendant pleading his certificate; and accordingly at the Guildhall Sittings after that term the cauſe came on before *Eyre* Ch. Juſt. when the material facts in evidence were: that the act of bankruptcy was committed by the Defendant on the 8th of *March* 1797; that the debt in queſtion accrued to the

Plaintiff in *April* following; and that the commiſſion iſſued on the 9th of *Auguſt* in the ſame year. A verdict having been found for the Plaintiff, and a rule *niſi* obtained by the defendant in *Trinity* Term following for ſetting aſide that verdict and entering one for the Defendant, the caſe ſtood over till *Eaſter* Term 1799.

Cockell and *Shepherd* Serjts. then ſhewed cauſe. The queſtion in this caſe ariſes upon the conſtruction of the words of the 5 *Geo.* 2. *c.* 30. *ſ.* 7. where it is ſaid, that "the bankrupt ſhall be diſcharged "from all debts by him, her, or them due or owing at the time "that he, ſhe, or they did *become bankrupt.*" Now a manifeſt diſtinction appears as well in the ſtatutes relating to bankrupts as in the proceedings themſelves between the time of the act of bankruptcy being committed, and of the commiſſion iſſuing. The 13 *Eliz. c.* 7. *ſ.* 1. directs, that certain perſons committing certain acts ſhall be deemed bankrupts, without referring to any adjudication. In 21 *Jac.* 1. *c.* 19. *ſ.* 14. the time of ſuing forth the commiſſion is expreſsly diſtinguiſhed from that in which the party becomes bankrupt; it being there enacted, that no *bonâ fide* purchaſer ſhall be impeached, unleſs the commiſſion to prove the party a bankrupt be ſued forth againſt ſuch bankrupt within five years after he ſhall *become a bankrupt.* So in 7 *Geo.* 1. *c.* 31. *ſ.* 1. which empowers creditors having *debita in præſenti ſolvenda in futuro* to prove under the commiſſion, the words uſed are "be"coming bankrupts, and commiſſions of bankruptcy being taken "out againſt them," evidently conſidering the party as bankrupt independent of the commiſſion. Where it has been the intention of the legiſlature to give relief againſt all debts due at the time of the commiſſion, a phraſe has been employed expreſſive of ſuch intention, as in 12 *Geo.* 3. *c.* 47. *ſ.* 2. by which perſons then in cuſtody were diſcharged from debts due before the iſſuing of their commiſſions. The ſame diſtinction is preſerved in the commiſſion, which ſtates, that whereas the party by exerciſing trade, &c. did *become bankrupt*, therefore the commiſſion iſſues. And it is to be obſerved, that in pleading, the expreſſion always uſed is, before the party *became bankrupt*, not before the iſſuing the commiſſion. It is the invariable practice of the Court of *Chancery* to expunge debts which have been proved under a commiſſion, where it appears that ſuch debts have been contracted ſubſequent to an act of bankruptcy. And many commiſſions have been ſuperſeded upon proof of an act of bankruptcy antecedent to the time when the petitioning creditor's debt accrued. As in *De Gols* v. *Ward*, *Caſ.*

Temp. Talb. 243. *Cooke's B. L.* 20. ed. 4. The reaſon there given by Lord *Talbot* is, that "the commiſſion muſt iſſue on the "petition of ſome creditor who could be relieved under it: but if "the debt is ſubſequent to the act of bankruptcy, the creditor "cannot come in under the commiſſion againſt the effects of the "bankrupt, though the perſon of the bankrupt will be liable." And though that deciſion was afterwards reverſed in the Houſe of Lords, yet it appears by 4 *Brown's Parl. Caſ.* 327. and *Ex parte Wainman*, *Cooke's B. L.* 21. that the reverſal proceeded on the ground of the old acts being in force at the time when the commiſſion iſſued; and it is ſaid by the Lord Chancellor in *Ex parte Wainman*, that if the caſe had been on the new acts, the Judges would have been of a contrary opinion. There is an anonymous caſe in 2 *Wilſ.* 135. *C. B.* which ſhews that the petitioning creditor's debt muſt be due from the bankrupt at the time of the act of bankruptcy committed, though it do not become due to the petitioning creditor till afterwards. The act of bankruptcy puts an end to the trading; it ſubjects the ſtock and effects of the bankrupt to be aſſigned; and from that period his accounts ought to be cloſed.

Le Blanc Serjt. in ſupport of the Rule. The effect of the conſtruction contended for by the Plaintiff will be to work an injuſtice to the creditors of the bankrupt whoſe debts have been incurred between the committing the act of bankruptcy and the iſſuing the commiſſion. For if a merchant after a ſecret act of bankruptcy carry on trade for any length of time, and obtain goods in the courſe of that trade to a conſiderable amount, the creditors anterior to the act of bankruptcy will be entitled by the above conſtruction to a diſtribution of all thoſe goods, to the excluſion of the very perſons by whom they were furniſhed. The 1 *Jac.* 1. *c.* 15. *ſ.* 6. enacts, that upon lawful warning left "at the dwelling place or houſe "where the bankrupt, his wife or family, for the moſt part of his "abode, did lodge or remain within one year before he, ſhe, or "they *became bankrupt*," the commiſſioners may proclaim the party a bankrupt. In this caſe, therefore, it is clear, that the words of the ſtatute muſt refer to the time previous to the iſſuing of the commiſſion, and not the committing the act of bankruptcy; for the latter may have taken place by an aſſignment of the party's effects five years before it was diſcovered; and the ſtatute could not intend that if he had changed his abode during that time, the warning ſhould be left at the place where he lived when the act of bankruptcy was committed. By 5 *Ann.* (a) *c.* 22. *ſ.* 1. if any perſon *who ſhall become bankrupt* ſhall remove, conceal, &c. any effects whereof he is poſſeſſed to the value of 20*l.* or any books, bonds, &c. with intent to defraud his creditors, every ſuch perſon *ſo becoming bankrupt*, and being thereof lawfully convicted, ſhall ſuffer as a felon without benefit of clergy. Now, ſuppoſing a man to have committed an act of bankruptcy by an aſſignment of his effects, and afterwards to remove his goods with an intent to defraud creditors, but not to elude the ſtatutes in force againſt bankrupts, he not conſidering himſelf to be a bankrupt, would ſuch a man be liable to an indictment and execution as a felon? The becoming bankrupt, is compounded of the two facts; of his committing an act of bankruptcy, and of the commiſſion iſſuing againſt him. The ſecond ſection of the ſame act directs, that the certificate ſhall be ſigned by four-fifths of the creditors in number and value, who ſhall have proved their debts: and the 5 *Geo.* 2. *c.* 30. *ſ.* 27. directs the aſſignees to be choſen by the major part in value of the creditors according to the debts then proved; but if proof of an act of bankruptcy, committed prior to the time when debts of ſuch creditors as have ſigned the certificate, or voted in the choice of aſſignees, accrued, be ſufficient to deſtroy their right to prove under the commiſſion, the certificate may be overturned, and the whole proceedings under the commiſſion unravelled, when every thing is ſuppoſed to be ſettled, the bankrupt having obtained his diſcharge, and a dividend having been actually made. So the 41ſt *ſect.* of the 5 *Geo.* 2. *c.* 30. enacts, that "all certificates "which have been allowed and confirmed and entered of record, or "a true copy of every certificate ſigned and atteſted as therein "mentioned, ſhall and may be given in evidence in any of his "Majeſty's Courts of Record, and be without any further proof "deemed, &c. to be a full and effectual bar and diſcharge of "and againſt any action or ſuit which ſhall be commenced or "brought by any creditor of ſuch bankrupt, for any debt or "demand contracted, due, or demandable *before the iſſuing of ſuch* "*commiſſion.*" Again, in the 19 *Geo.* 2. *c.* 32. *ſ.* 2. which entitles obligees in bottomree and *reſpondentia* bonds, and the aſſured in policies of inſurance, to prove their debts where the contingency happens after the iſſuing of the commiſſion, the expreſſion uſed is, that "the debt ſhall be proved, the dividend "received, and the bankrupt be diſcharged, in like manner to all "intents and purpoſes as if ſuch loſs or contingency had happened, "and the money due in reſpect thereof had become payable before

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(a) Vid. *Ruffhead's Statutes, Appendix*, p. 235.

"the time *of the iſſuing of ſuch commiſſion.*" Nothing can more ſtrongly ſhew the opinion of the legiſlature, that the time of iſſuing the commiſſion is the true period up to which all other debts may be proved. With reſpect to the 12 *Geo.* 3. *c.* 47. *ſ.* 2. which diſcharged bankrupts in cuſtody previous to 25th *March* 1772, from debts due *before their reſpective commiſſions iſſued*; it is not probable that the legiſlature intended to put thoſe who had not obtained their certificate, probably in conſequence of ſome miſbehaviour, on a better footing than all thoſe who had conformed themſelves to the bankrupt laws. From the expreſſions therefore of all theſe ſtatutes, it is clear that the legiſlature has uſed the term "becoming "bankrupt" as ſynonymous with the term "when the commiſſion "iſſued;" at leaſt in thoſe acts which relate to the proof of debts, and the effect of the certificate, though perhaps in thoſe which deſcribe the circumſtances conſtituting a bankrupt, the act of bankruptcy and the commiſſion may ſometimes have been treated as diſtinct. It is alſo to be obſerved, that the Court of *Common Pleas* in *Perkins* v. *Kempland and others*, 2 *Bl.* 1107, refer to the date of the commiſſion as the period beyond which a debt cannot be proved, and to which the operation of the certificate as a bar is confined.

EYRE Ch. J. It is agreed on all hands that this caſe is new: we muſt therefore conſider of it; and in entering into that conſideration we muſt look through all the bankrupt laws, and conſtrue the exceptions uſed in the 5 *Geo.* 2. with reference to the conſtruction which has prevailed upon the reſt of the bankrupt laws. The 5 *Geo.* 2. *c.* 30. *ſ.* 7. directs that every bankrupt conforming, &c. ſhall be diſcharged from all debts due or owing at the time he *did become bankrupt:* and yet in the 41ſt ſection of the ſame ſtatute it is ſaid, that the certificate, or a true copy thereof, ſhall be given in evidence, and be a bar to any action brought for a debt due before *the iſſuing of the commiſſion.* Again, the 7 *Geo.* 1. *c.* 31. *ſ.* 1. which allows holders of bills payable at a future day to prove under the commiſſion, deſcribes the bills in queſtion as bills not due or payable at the time of ſuch perſon *becoming a bankrupt;* and yet the 19 *Geo.* 2. *c.* 32. *ſ.* 2. allows the obligees in bottomree and *reſpondentia* bonds, and the aſſured in policies of inſurance to prove in reſpect of ſuch bond or policy as if the loſs had happened before the time of *iſſuing the commiſſion.* So 12 *Geo.* 3. *c.* 47. which continued the 5 *Geo.* 2. *c.* 30, then near expiring, in the ſecond and third ſections diſcharges perſons againſt whom commiſſions had iſſued previous to 25th *March* 1772, from all debts due before the *commiſſion iſſued.* In ſome places therefore the ambiguous expreſſion "becoming bankrupt" is uſed, and in others, that of the "iſſuing of the commiſſion" without any reference to the act of bankruptcy. It ſhould ſeem therefore, that the two expreſſions muſt control and expound each other. Doubtleſs it is a circumſtance of conſiderable weight, that a practice of expunging debts accrued ſubſequent to the act of bankruptcy, has prevailed in that Court, to which the general juriſdiction ariſing under the bankrupt laws belongs. Whatever rule has been adopted in that Court ſufficient to afford us a ground for reaſoning by analogy is entitled to conſiderable attention. This however being a new caſe upon an act of parliament, the deciſion belongs to the courts of law, and I ſhall not hold myſelf concluded by any practice of the court of Chancery. The practice alluded to appears open to many obſervations. As ſoon as a ſingle inſtance had occurred of a debt being expunged, on account of its having been contracted ſubſequent to the act of bankruptcy, it ought to have been conſidered as an univerſal rule to which all the commiſſioners were bound to conform, that no proof of debts ſhould be received unleſs the time were alſo ſhewn when they accrued. It appears however to be the uſage of the commiſſioners, to require no other proof than that the debt was due at the time of iſſuing the commiſſion; and I am much ſurpriſed to find this uſage in ſome degree ſanctioned by the obſervation of Lord Chancellor *Hardwicke*, "that commiſſioners "very rightly declare a man a bankrupt only before iſſuing the "commiſſion, without ſpecifying any preciſe time (*a*)." Suppoſe a creditor to have proved a debt accrued ſubſequent to the act of bankruptcy, and to have received a dividend: could that dividend be taken from him? Poſſibly the court of Chancery might heſitate to interfere: but how would the caſe ſtand in a court of law? I was much ſtruck with the apparent injuſtice of excluding the proof of debts accrued ſubſequent to an act of bankruptcy, and thus allowing the few creditors who exiſted when the act of bankruptcy was committed to ſweep away all the effects acquired ſince that time, to the prejudice of thoſe very perſons by whom they had probably been furniſhed. Beſides, the perſon of the bankrupt himſelf, after the ſurrender of all his property, might ſtill remain liable to the majority of his creditors. I may find myſelf obliged to ſay, that the rule which has been adopted muſt be adhered to,

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(*a*) Vid. 1 *Atk.* 119.—In 1 *Atk.* 78. Lord *Hardwicke*, ſpeaking of the clauſe in the 13 *Eliz.* which directs the commiſſioners to pay creditors in proportion to their debs, ſays: "The queſtion is, what debts are here meant? And I am of opinion, it means debts due at the time of the bankruptcy, or when the commiſſion iſſued, *which is the ſame*; for to prevent diſputes about the time when he becomes a bankrupt, the commiſſioners always find in general, that he was a bankrupt at the time the commiſſion iſſued."

and that it is for the legiſlature, not for the court, to make an alteration. Still, however, the conſideration of inconvenience will weigh againſt a great deal of practice in forming my opinion.

Cur adv. vult.

On this day the opinion of the Court was delivered by

BULLER, J. The queſtion in this caſe is, whether the certificate be a bar to the Plaintiff's demand? We who were in Court laſt term (*a*) have conſidered the point, and are all of the opinion which I ſhall now deliver.

By the 5 *Ann. c.* 22. *ſ.* 2. no perſon *becoming a bankrupt* ſhall be diſcharged from all or any debts owing at the time of *ſuch bankruptcy*, unleſs the certificate be firſt ſigned by four-fifths in number and value of the creditors who have proved debts. The 3 *Geo.* 1. *c.* 12. recites the ſame words, and the 5 *Geo* 1. *c.* 24. ſays, that bankrupts conforming, *&c.* ſhall be diſcharged from all debts due or owing at the time they *became bankrupt*, and may plead that the cauſe of action did accrue before ſuch time as they *became bankrupt*. The 5 *Geo.* 2. *c.* 30. has the ſame words. Uſe has ſanctioned them, and it is moſt clear that they have not been employed unadviſedly or inconſiderately. In purſuance of theſe ſtatutes the words of the plea have always been, that on ſuch a day the Defendant *became a bankrupt*; under ſuch plea, it has been the conſtant practice and uſage to prove that the day on which the act of bankruptcy has been committed, was ſubſequent to the contracting of the debt. We think the words of the ſtatute are ſo explicit that they admit of no doubt, and if there were room for doubt, the uſage and practice which have prevailed muſt decide. The practice of the Court of Chancery to expunge debts which have become due ſince the act of bankruptcy, is likewiſe founded on the ſame conſtruction of the ſtatute, and that affords a very long liſt of authorities, entitled to the greateſt weight and conſideration, becauſe the whole buſineſs of bankruptcy is the almoſt daily ſubject of deciſion in that Court. I think, it was admitted, that a debt which was not contracted till after the act of bankruptcy, would not be a good foundation for a commiſſion, and if it will not ſuſtain the commiſſion, the propoſition, that it may be proved under the commiſſion at all, becomes extremely difficult. The proof of a debt is the ſame, whether it be the debt of a petitioning creditor or of any other creditor, for the creditor muſt in every caſe ſwear, that the bankrupt was indebted *before*, and at the time of ſuing out the commiſſion (*b*).

(*a*) *Buller*, *Heath*, and *Rooke*, Js.

(*b*) 2 *Co. B. L.* 1. 33.

But the two grounds of argument inſiſted on for the Defendant were, firſt, that a perſon is not a bankrupt till a commiſſion has iſſued againſt him; ſecondly, that ſome ſtatutes make uſe of the words "at the time of iſſuing the commiſſion," and that all ſtatutes made *in pari materiâ* ought to be conſidered together, and expounded by each other. As to the firſt ground, undoubtedly a man does not fall within many of the proviſions of the bankrupt laws till he is declared a bankrupt, and therefore there is the ſame reaſon for extending the diſcharge to that time as to the date of the commiſſion. But that has not been contended for. The commiſſion and the declaration of the bankruptcy relate to the act of bankruptcy, and when a man is declared a bankrupt, he is ſo to all intents and purpoſes from the time that the act of bankruptcy was committed. But ſpeaking of a bankrupt in the ſenſe of the objection is a technical uſe of the word, whereas in the natural ſenſe, it means only having committed an act of bankruptcy. In the affidavit to obtain the commiſſion, the petitioner ſwears, that he believes the party *is become a bankrupt*, within the intent of the ſtatutes, which being previous to the commiſſion, of courſe cannot include it. It is impoſſible to read the caſe of *Goddard* v. *Vanderheyden* without ſeeing that this point was then conſidered as clear. It is ſtated as a thing before ſettled, that the cauſe of action muſt be ſuch as would produce a proveable debt, which, it is ſaid, was not the caſe there at the time of the *bankruptcy committed*, a term very inapplicable to the iſſuing of the commiſſion. Lord Ch. J. *De Grey* (*a*) ſtates the queſtion to be, what debt was due from the Defendant to

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(*a*) The judgment of Lord Ch. J. *De Grey* in the above caſe was cited by Mr. J. *Buller* from a manuſcript note of the late Mr. J. *Gould*, to the following effect.

De Grey Ch. J. The Defendant in this action being arreſted, the preſent Plaintiff became his bail to the Sheriff, in conſideration of which the Defendant promiſed to ſave him harmleſs. The Defendant not having put in bail, the Plaintiff in the original cauſe ſued this Plaintiff on the bail bond and obtained judgment, and he was obliged to pay the debt and coſts. To recover this, he ſued the Defendant, who pleaded that he became bankrupt before the cauſe of action accrued; at the trial before Lord *Camden*, a caſe was reſerved, which ſtated; that in *May* 1763, the Defendant was arreſted; that the Plaintiff became bail for him; that in *Mich.* Term 1763 judgment was obtained againſt the Plaintiff on the bail bond ſo given by him; that on the 10th of *March* 1764, the Defendant became a bankrupt; that at that time a writ of error was depending on the judgment obtained on the bail bond, which having been carried from the Exchequer Chamber into Parliament, was there nonproſſed in *January* 1765; that on the 21ſt of the ſame month a *fieri facias* iſſued againſt the preſent Plaintiff at the ſuit of the Plaintiff in the original action, and thereupon the debt due from this Defendant with the coſts was paid, and that on the 2d of *May* 1765, this Defendant obtained his certificate.

The queſtion made is, whether the debt recovered by the Plaintiff was a debt which could be proved as ſuch againſt the Defendant under the commiſſion, and was therefore

1799.
BAMFORD
v.
BURRELL.

to the Plaintiff on the 10th of *March* 1764, which was the very day on which the act of bankruptcy was committed. Now this

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fore diſcharged by the certificate: There are three proviſions in the bankrupt laws relative to this ſubject; the firſt directs what debts ſhall be admitted; the ſecond, what debts ſhall be diſcharged, and the third, how the diſcharge is to be pleaded. By the old acts of 34 & 35 *Hen.* 8. *c.* 4. & 13 *Eliz.* *c.* 7. it is generally provided, that the effects of the bankrupt ſhall be divided amongſt the creditors. The 1 *Jac.* *c.* 15. directs, that they ſhall be divided amongſt thoſe that come in within four months. No poſitive rule is laid down in former acts to diſtinguiſh who are to be admitted to ſhare, but the principle is to divide equally. The commiſſioners have a power to take order according to wiſdom and diſcretion, and to fix which debts were owing when the party became bankrupt. The ſucceeding act of 1 *Jac.* *c.* 15. takes it up ſo: and ſo it is underſtood in the 21 *Jac.* *c.* 19. except where execution has been executed at the time of the bankruptcy. The ſubſequent ſtatutes of 5 *Ann.* *c.* 22. 5 *Geo.* 1. *c.* 24. & 5 *Geo.* 2. *c.* 30. conſider it in the ſame light, making all ſecurities given by the bankrupt to creditors for ſecuring debts due at the time of the bankruptcy, as a conſideration for obtaining his certificate, void. With reſpect to the diſcharge of debts, the old ſtatutes did not releaſe the perſon or future effects, but provided that the ſame remedy ſhould ſubſiſt as before for what remained unſatisfied. By 4 *Ann.* *c.* 17. bankrupts are made ſubject to impriſonment, and in ſome caſes to capital puniſhment: but if they conform, then (amongſt other things) they are diſcharged from all debts due and owing when they became bankrupts. The ſubſequent ſtatutes make the ſame proviſion. And when they direct how the diſcharge is to be pleaded, they provide that if the bankrupt be ſued for debts due, *&c.* he ſhall be diſcharged, and may plead that the cauſe of action accrued before the bankruptcy. Now, may not a cauſe of action accrue where there is no debt due and owing? Yet the debt muſt be proveable under the commiſſion, or it cannot be diſcharged: and to be ſo, it muſt be a debt due and owing, which is the ſame thing as demandable, which a note payable at a future day is not. The firſt thing which a creditor muſt ſwear to is a ſum due: and by 5 *G* 2. *c.* 30. he is guilty of perjury if he ſwear to what is not due, or to more than is due. Therefore, future debts, not then demandable, nor then due and owing, could not be proved. The 7 *Geo.* 1. *c.* 31. which directs that ſecurities payable at a future day ſhall be proveable under the commiſſion, and diſcharged by the certificate, has been held to extend to all kinds of certain debts. *Swaine* v. *De Mattos*, 2 *Str.* 1211. Contingent debts, however, ſtill remained unprovided for. Therefore, in *Tully* v. *Sparkes*, 2 *Str.* 867. the Court of *K. B.* held, that a bond for the payment of a ſum after the death of the obligor, if he married *M. L.* and ſhe ſurvived him, was not proveable. Parliament then interpoſed in favour of trade, and by 19 *Geo.* 2. *c.* 32. made bottomry and *reſpondentia* bonds proveable. On the principle of theſe two ſtatutes, the Court of Chancery endeavoured to introduce another caſe of compaſſion. Tradeſmen generally provide for their families by perſonal ſecurities: they enter into a bond to pay ſo much money to truſtees on the contingency of the wife or children ſurviving the obligor. If the contingency had not happened during the commiſſion, theſe bonds could not come in. But in caſes where the bankrupt has died during the proceedings, the bond or covenant becoming due, the Court of Chancery has admitted it; *Ex parte Caſwell*, 2 *P. Wms.* 497. This has been done ſeveral times; and Lord *C. King* held, that the diſtribution of the eſtate ſhould not wait for the contingency, but that if the contingency happened before diſtribution made, or even before the ſecond dividend, the creditor ſhould come in. Lord *Hardwicke* on the 6th of *Auguſt* 1740, in the caſe *ex parte Newburgh*, held, that where a bond on marriage was given to truſtees to pay a ſum of money, if the wife ſurvived, and no dividend had been made before the huſband's death, held that the commiſſioners were right in admitting the truſtees. But *ex parte Groome*, 1 *Atk.* 115.

this plainly ſhews what his opinion was. On the ſecond objection the ſtatutes 12 *Geo.* 3. *c.* 47. & 14 *Geo.* 3. *c.* 77. were mentioned

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where the huſband covenanted before marriage to leave his wife 600*l.* in caſe ſhe ſurvived him, and the huſband became bankrupt, and died before any dividend made, Lord *Hardwicke* decided, that the wife ſhould not be admitted, becauſe it was not a debt which would be diſcharged by the certificate; but obſerved, that creditors and parties have often been compaſſionate. *Ex parte Michell*, 1 *Atk.* 120. was a like covenant and a bond; the bankrupt paid 9*s.* in the pound and died; the wife petitioned Lord *Hardwicke*, who admitted her, there being no oppoſition, and declared, that if there had been a judgment the wife would have been entitled to come in as a claimant before the death of the huſband, and the aſſignees muſt have retained enough to anſwer a dividend. The Bar much doubted of the propriety of the order; Lord *Hardwicke* recollected the impropriety himſelf, ordered it to be ſpoken to again, and was ſatisfied that it would have been a dangerous precedent. He ſaid that a like order in *Greenaway*'s caſe, 1 *Atk.* 113. was made by conſent of the aſſignees, and that Lord *King*'s opinion in *ex parte Caſwell*, 2 *P. Wms.* 497. was merely *obiter*, and had been doubted both by Lord *Talbot* and himſelf. It is now ſettled that ſuch family proviſions cannot come in unleſs the contingency happen before the act of bankruptcy. Yet even here the Court has introduced exceptions; for where a bill is brought to recover the wife's fortune, the Court will oblige the aſſignees to do reaſonable juſtice. It was ſaid in *Mitchell*'s caſe, that if there be a judgment it becomes a legal debt; but I doubt whether it was admitted as ſuch. In *Jacob*'s caſe, 1759, the huſband tried an experiment, and confeſſed a judgment in contemplation of bankruptcy; but Lord *Northington* refuſed to admit the wife a creditor, it being an open fraud. There is another ſpecies of debts which comes nearer to the preſent, *viz.* debts not only contingent but uncertain in point of liquidation. In theſe caſes it is not neceſſary that the ſpecific ſum ſhould appear as the balance of account; the claim may be admitted, and the Court will take a method to aſcertain what was due at the time of the bankruptcy. But where it is uncertain whether the cauſe of action will ever be authenticated; or, if it be, whether it will produce a debt to any particular amount, it is otherwiſe. Thus an aſſault and battery committed before the bankruptcy is a good cauſe of action. But where a verdict in ſuch a caſe was recovered during the proceedings under the commiſſion, and judgment was not obtained till after the certificate, the Defendant having applied to *K. B.* to be diſcharged, it was objected that the bankrupt had nothing to do but to plead that the cauſe of action aroſe before the bankruptcy. But the Court held, that to do that the cauſe of action muſt be ſuch as produces a proveable debt, which was not the caſe there at the time of the bankruptcy committed. It was then urged; that the verdict having aſcertained the amount ſhould have relation to the cauſe of action, but the Court ſaid, that the debt muſt be due and owing, and decided in favour of the Plaintiff. I never knew an inſtance of an attempt to prove a debt where the cauſe of action aroſe on a breach of covenant in a leaſe. In *Berkeley and Another* v. *Kemſtow*, *Cro. Eliz.* 123. a promiſe to keep a priſoner ſafely, and to ſave the gaoler harmleſs, was held by the Court to be a promiſe on which the party might ſue preſently upon the eſcape. But that ſort of caſe differs from what was mentioned at the bar, of a right of action before a ſpecial damnification. For where a bond is given to indemnify bail, and on the party not appearing, the ſurety immediately brings an action, the indemnity bond may be held forfeited, becauſe of the danger which the ſurety incurs of being ſued. I will not ſay how ſuch bonds as theſe could be admitted. But theſe caſes are ſtrong authorities. And if in the caſe at the bar judgment had been obtained againſt the bankrupt, it would have been ſimilar in principle to them; for then there would have been a legal debt, though the damnification would have been uncertain. On the 10th of *March* 1764 what debt was due from the Defendant to the Plaintiff? It is true the latter was to be ſaved harmleſs; but if he had gone in under mentioned and relied on. But thoſe are particular inſolvent acts, and do not at all alter the general ſyſtem of the bankrupt laws. The inſolvent acts are temporary merciful laws, diſcharging men from their debts becauſe they have nothing to pay, and the legiſlature undoubtedly may diſcharge them from what time they think fit. They might have extended the diſcharge to the time of the certificate, if they had pleaſed, with equal reaſon. And yet all caſes, except thoſe depending at the time when the particular acts paſſed, would remain to be decided under the general bankrupt laws. Under thoſe general laws, we are of opinion, that debts proveable under the commiſſion, and debts to be diſcharged by the certificate, are convertible terms; and that debts not due at the time of the act of bankruptcy, except in the caſes ſpecially pro-

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the commiſſion, he muſt have proved ſome debt due. Can I imply a damnification? It is a probable loſs; but it is difficult to ſay what the Plaintiff would have ſworn to, and more ſo to ſay what he would have demanded. Suppoſe no bankruptcy had happened, the Defendant could not have been held to ſpecial bail, unleſs the Plaintiff had ſuffered a ſpecial damnification. What damage would a jury have given? At any rate judgment could only ſtand as a ſecurity, for no execution could be taken out till the party were actually damnified, 6 *Mod.* 77. Though there was no actual ſubſiſting debt on the 10th of *March* 1764 due and owing, yet the judgment in this caſe is evidence of the debt, and may be a meaſure for the damnification, but that damnification may not be what is now complained of, namely, paying the whole ſum. The original Plaintiff might have come in under the commiſſion and proved the debt, and then the bankrupt would not have been indebted for it to this Plaintiff alſo. Or ſuppoſe the Defendant to have paid 10*s.* in the pound, the remainder would have been the damnification. Or ſuppoſe the Defendant had been taken in execution by the original Plaintiff, that would have been a diſcharge of the bail. Indeed, how could the Plaintiff come in under the commiſſion, when by his writ of error he had aſſerted that he had not paid nor ought to pay the debt? that would have precluded him from proving the judgment. Suppoſe this Plaintiff had proved the debt, and received 20*s.* in the pound before the certificate allowed, and then run away, and that the original creditor had alſo, before the certificate allowed, taken the bankrupt in execution, in that caſe the latter would have got nothing. Suppoſe this Plaintiff had not paid the debt, but had ſuffered himſelf to be taken in execution, could he have come in as a creditor for the money? Such a caſe, I believe, never happened. In the caſes cited, the Court held, that there was a cauſe of action even from the terror of an execution. In the preſent caſe there was alſo a cauſe of action from the Defendant's non-appearance; but the damnification is not money paid, and therefore it is not a cauſe of action upon a debt due and owing, which is the only kind of debt proveable under a commiſſion. I think the judgment does not add any material circumſtance to the caſe. In *Chilton* v. *Wiffin* (3 *Wilſ.* 13.) the acceptor of a bill of exchange, who had no effects in his hands, but was only a ſurety, on the failure of the drawer his principal, was only admitted a creditor for what he had paid; but as to the reſt, it was held not to be a debt due and owing, and therefore he could not have come in under the commiſſion. That caſe is ſtrong in principle; and it is in point with the preſent, except as to the circumſtance of the judgment, which I lay out of my conſideration.

Per Curiam.—Judgment for the Plaintiff.

vided for by particular ſtatutes, are not affected by the commiſſion.

This caſe admits of many other obſervations, both on the ſtatutes and the judicial determinations upon them: but, perhaps, I may be thought to have been too prolix already on a point, which appears to have been long and fully ſettled, and I ſhould not have occupied ſo much time, but from reſpect to a great opinion which ſeemed to differ from that which I now deliver, and to which opinion we all owe the utmoſt deference. Let the judgment be entered for the Plaintiff.

Judgment for the Plaintiff.

Nov. 12th.

LECHMERE v. RICE.

To debt on bond the Court will permit the Defendant to plead *non eſt factum*, and uſury.

WILLIAMS Serjt. ſhewed cauſe againſt a rule *niſi* for pleading to an action of debt on bond; firſt, *non eſt factum*; and ſecondly, that the bond was given upon an uſurious conſideration: and contended, that although uſury was not, ſtrictly ſpeaking, an unconſcientious plea, yet, that as it is the conſtant practice of the Court to refuſe a rule of this kind where the pleas are inconſiſtent (*a*), they would not depart from that rule in the preſent inſtance. He alſo relied on an affidavit, ſtating, that the witneſs to the bond lived in *Worceſterſhire*, and that the Plaintiff would be put to great expence if he were obliged to bring him to *London* where the venue was laid.

Shepherd Serjt. in ſupport of the Rule, inſiſted, that the object of pleading *non eſt factum* was to oblige the Plaintiff to produce the witneſs to the bond, in order that the Defendant might have the opportunity of croſs-examining him as to the uſury.

The Court were of opinion that the two pleas were not more inconſiſtent than many which are allowed to be pleaded together, as not guilty to an aſſault and a ſpecial juſtification; and that probably the true reaſon for oppoſing this rule was, as had been ſuggeſted, to keep the atteſting witneſs out of the way. They obſerved, that the Court of Common Pleas only continued to exerciſe an authority over applications for pleading ſeveral

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(*a*) See 1 *Tellon*, 298. 299. But in *Steele and Others* v. *Pindar*, *Barnes*, 347. where not guilty, and a general releaſe were allowed to be pleaded together, a reaſon was given by the Court which applies to the principal caſe; *viz.* that the ſecond plea could not be given in evidence under the general iſſue; and with this agrees *Shaw* v. *Everett*, *ante*, vol. 1. p. 222.

matters (which had originally been the practice of the *King's Bench* alſo) in order to prevent an oppreſſive uſe being made of that liberty which is given by the ſtatute (*a*).

Rule abſolute.

(*a*) 4 *Anne*, *c.* 16. *ſ.* 4.

BROWNING *v.* S. WRIGHT and OTHERS, Executors of J. WRIGHT.

Nov. 13th.

A. after granting certain premiſes in fee to *B.*, and after warranting the ſame againſt himſelf and his heirs, covenanted, that notwithſtanding any act by him done to the contrary he was ſeiſed of the premiſes in fee, *and that he had full power*, &c. *to convey* the ſame; he then covenanted for himſelf, his heirs, executors, and adminiſtrators, to make a cart-way, and that *B.* ſhould quietly enjoy without interruption from himſelf, or any perſon claiming under him; and laſtly, that he, his heirs, and aſſigns, and all perſons claiming under him, ſhould make further aſſurance. Held, that the intervening general words, "full power, &c. to convey," were either part of the preceding ſpecial covenant; or, if not, that they were qualified by all the other ſpecial covenants againſt the acts of himſelf and his heirs.

COVENANT againſt the repreſentatives of *James Wright*. The declaration ſtated, that the ſaid *J. Wright* by indenture in his life-time, fully, clearly and abſolutely *granted*, *bargained*, *ſold*, *enfeoffed*, *and confirmed* to the Plaintiff, his heirs and aſſigns, a certain piece or parcel of arable land (deſcribing it) and all ways waters, &c. and all his eſtate, right, title, &c. in law or equity, to have and to hold to the Plaintiff, his heirs and aſſigns, abſolutely and for ever; that he warranted it againſt himſelf and his heirs, and for himſelf and his heirs, and covenanted that he was, notwithſtanding any act by him done to the contrary, lawfully and abſolutely ſeiſed in fee ſimple, *and that he had a good right, full power, and lawful and abſolute authority to convey;* that by virtue of this conveyance the Plaintiff entered and was poſſeſſed and fulfilled all his covenants and agreements. "Yet proteſting that *J. Wright* did not in his life time well and truly obſerve &c. and that the ſaid Defendants have not nor have any of them ſince the death of the ſaid *J. Wright* well and truly obſerved &c. any of the covenants clauſes and agreements in the ſaid indenture contained on their part and behalf reſpectively to be obſerved, &c. in fact the ſaid Plaintiff ſays that the ſaid *J. Wright* had not at the time of making the ſaid indenture nor at any time before or ſince *good right full power and lawful and abſolute authority or any right power or authority whatſoever to convey or aſſure the ſaid piece or parcel of arable land or any part thereof to the ſaid Plaintiff his heirs and aſſigns in manner* *aforeſaid or in any manner whatſoever*; (*a*) by reaſon whereof afterwards and after the making of the ſaid indenture and the death of the ſaid *J. Wright to wit* on *&c.* one *Edward Child* and *Mary* his wife then being and claiming to be lawfully and rightfully ſeiſed of and in the ſaid piece or parcel of arable land with the appurtenances in their demeſne as of fee in right of the ſaid *Mary* and having a lawful right of entry into the ſame in right of the ſaid *Mary* by a lawful (*b*) and rightful title not derived by from under or by means of the ſaid indenture or by from or under the ſaid Plaintiff required the ſaid Plaintiff to deliver up the poſſeſſion of the ſaid piece or parcel of arable land to them the ſaid *Edward* and *Mary* or to become tenants thereof to and to hold the ſame of the ſaid *Edward* and *Mary* at and under a certain yearly rent *to wit* the yearly rent of thirteen

pounds

(*a*) As the Plaintiff in this caſe meant to rely on the covenant by *J. Wright* that he had *good right, full power, and lawful authority to convey*, it ſeems that after negativing the Defendant's title to convey he need not have proceeded to ſtate an eviction; for, on a general covenant, the breach may be as general as the covenant. *Bradſhaw*'s caſe, 9 *Co.* 60. *b. Co. Ent.* 117. *a. Cro. Jac.* 304. S. C. *Muſcot* v. *Ballet*, *Cro. Jac.* 369. *Glineſter* v. *Audley*, *Sir T. Raymond*, 14. *Wooton* v. *Hele*, 1 *Mod.* 292. agreed, *Per Cur.* *Holder* v. *Taylor*, *Hob.* 12. Indeed, it may be queſtionable whether the averment, that *E. Child* and *Mary* his wife claimed to be lawfully ſeiſed of the premiſes, and required the Plaintiff to deliver up poſſeſſion or to become tenant to them, and that unleſs he had accordingly become their tenant, he would have been evicted, and that he did become their tenant, without ſhewing any entry by *E. Child* and his wife, or any actual diſturbance by them to authorize him in ſo doing, can be ſaid to be ſuch an averment of *eviction* as the law requires in caſes where any averment of this kind is neceſſary. In *Foſter* v. *Pierſon*, 4 *Term Rep.* 620. *n.* (*a*) it was admitted that the eviction need not be alleged to have been by legal proceſs; but ſome eviction muſt be ſhewn; for *Shepherds Touchſtone*, *c.* 7. p. 170. ſpeaking of a covenant for quiet enjoyment, and diſturbances lawful and unlawful, ſays, "and in all caſes where any perſon hath title, the covenant is not broken until ſome entry or other actual diſturbance be made by him upon his title." So in *Hunt* v. *Cope*, *Cowp.* 243. where the Plaintiff, to an avowry for rent, pleaded certain acts of the leſſor, "whereby he was deprived of the uſe of the premiſes," without averring eviction, Lord *Mansfield* ſaid, that the leſſee certainly ſhould have pleaded eviction, and the facts ſtated might have been ſufficient for the jury to have found a verdict in his favour; and the plea was held ill.

(*b*) The caſes of *Foſter* v. *Pierſon*, 4 *Term Rep.* 617. and *Hodgſon* v. *The Eaſt India Company*, 8 *Term Rep.* 278. have now completely ſettled that an allegation of "lawful title" is ſufficient, without ſetting out that title. But the Plaintiff muſt ſhew in ſome manner that the title of the perſon entering upon him is not derived from himſelf; and a mere averment that he had "lawful title," without this qualification, would be bad after verdict. *Kirby* v. *Hanſaker*, *Cro. Jac.* 315. *Wooten* v. *Hele*, 2 *Saund.* 177. 1 *Lev.* 301. 1 *Sid.* 466. 1 *Mod.* 290. S. C. *Jenkins*, 340. This may be done however by averring generally, that the perſon evicting had lawful title before the date of the grant to the Plaintiff. *Skinner* v. *Kilbys*, 1 *Shower* 70. *Proctor* v. *Newton*, 2 *Lev.* 37. *Buckby* v. *Williams*, 3 *Lev.* 325. *Jordan* v. *Twells*, *Caſ. temp. Hardw.* 172. per Ld. *Hardwicke*, and this mode was adopted in *Foſter* v. *Pierſon*.

BROWNING
v.
WRIGHT.

pounds to be therefore paid by the ſaid Plaintiff and would then and there unleſs the ſaid Plaintiff had ſo delivered up the poſſeſſion thereof or become ſuch tenant of and ſo held the ſame have ejected evicted expelled put out and amoved the ſaid Plaintiff from and out of the poſſeſſion thereof whereupon the ſaid Plaintiff to prevent his being obliged ſo to deliver up the poſſeſſion thereof or being ſo ejected evicted expelled put out and amoved then and there was forced to and did become ſuch tenant thereof to and ſo held the ſame of the ſaid *Edward* and *Mary* whereby" *&c.* alleging the Plaintiff's loſs in being deprived of his fee-ſimple, and being obliged to hold as tenant; his having laid out money on the premiſes previous to his knowledge of the badneſs of *J. Wright*'s title, and his having paid a large ſum to *E. Child* and *Mary* his wife for the meſne profits.

The Defendants prayed *oyer* of the indenture, and it was read to them in theſe words, *to wit*, "This indenture made, *&c.* witneſſeth, that the ſaid *J. Wright*, for, and in conſideration of the ſum of 180*l.* of lawful money of *Great Britain*, to him in hand paid by the ſaid Plaintiff, at or before the ſealing and delivery of theſe preſents, the receipt whereof is hereby acknowledged, hath *granted*, *bargained*, *ſold*, *enfeoffed*, *and confirmed*, and by theſe preſents doth fully, clearly, and abſolutely grant, bargain, ſell, enfeoff, and confirm unto the ſaid Plaintiff and to his heirs and aſſigns, all that piece or parcel of arable land (deſcribing it) with the appurtenances and the reverſion and reverſions, remainder and remainders, rents, iſſues, yearly, and other profits of the ſaid premiſes, and every part and parcel thereof; and all the eſtate and eſtates, right, title, intereſt, uſe, truſt, claim and demand whatſoever, in law or equity, of him the ſaid *J. Wright*, of, in, to, or out of the ſaid premiſes, every or any part or parcel thereof; To have and to hold the ſaid piece or parcel of arrable land, hereby granted, bargained, ſold, enfeoffed, and confirmed, or mentioned, or intended ſo to be, and every part and parcel thereof, unto the ſaid Plaintiff, his heirs, and aſſigns for ever, to and for the only proper uſe and behoof of the ſaid Plaintiff, his heirs and aſſigns, abſolutely and for ever, without any condition, redemption, truſt, or revocation whatſoever, and to and for no other uſe or uſes, intents, truſts, or purpoſes whatſoever; and *the ſaid* J. Wright *and his heirs, the aforeſaid piece or parcel of arable land, hereby granted or mentioned, or intended to be hereby granted*

1799.

Browning
v.
Wright.

unto the ſaid Plaintiff, or his heirs, againſt him the ſaid J. Wright, *and his heirs, ſhall, and will warrant and for ever defend by theſe preſents.* And the ſaid *J. Wright* for himſelf, his heirs, executors, and adminiſtrators, doth covenant and agree to and with the ſaid Plaintiff, his heirs and aſſigns *in manner and form following,* that is to ſay, that he the ſaid *J. Wright for and notwithſtanding any thing by him done to the contrary* is lawfully and abſolutely ſeiſed of the ſaid piece or parcel of arable land hereby granted, of a good, ſure, perfect, lawful, abſolute, and indefeaſible eſtate in fee-ſimple, without any manner of condition, limitation, uſe, or truſt, or any other reſtraint, matter, or thing whatſoever, to alter, change, charge, defeat or determine the ſame; *And that he hath good right, full power, and lawful and abſolute authority to convey and aſſure the ſame to the ſaid Plaintiff, his heirs and aſſigns, in manner aforeſaid;* and the ſaid *J. Wright* for himſelf, his heirs, executors, or adminiſtrators, doth further covenant and agree to and with the ſaid Plaintiff, his heirs and aſſigns, that he the ſaid *J. Wright* ſhall and will, as ſoon as convenient, ſet out, at the expence of the ſaid Plaintiff, a cart-way to the ſaid piece or parcel of arable land, through another field in the poſſeſſion of *William Triggs;* which cart-way, when ſet out, the ſaid *J. Wright* and his tenants are to have a free paſſage to and from the farm belonging to the ſaid *J. Wright,* now in the occupation of the ſaid *William Triggs,* without allowing any thing for the ſame; And that he, the ſaid Plaintiff, his heirs and aſſigns, ſhall and lawfully may, at all times hereafter, peaceably and quietly hold and enjoy the ſaid piece or parcel of arable land hereby granted, and receive the rents and profits thereof to his and their own uſe and uſes, without any manner of let or interruption of the ſaid *J. Wright,* or any other perſon or perſons claiming under him: And laſtly, that he the ſaid *J. Wright,* his heirs and aſſigns, and all other perſons claiming, or to claim any eſtate or intereſt of, in, or to the ſaid premiſes, or any part thereof, by, from, or under him, ſhall, and will from time to time, and at all times hereafter, make, ſuffer, and execute, or cauſe to be ſuffered and executed, all and every ſuch further and other lawful and reaſonable act and acts, aſſurance and conveyances in the law whatſoever, for the better and more perfect aſſuring and confirming of the ſaid piece or parcel of arable land, unto the ſaid Plaintiff, his heirs and aſſigns, as by his or their Counſel learned in the law of this realm, ſhall be reaſonably deviſed, adviſed, or required. In witneſs whereof the ſaid parties to theſe preſents have hereunto ſet their hands and ſeals the day and year firſt above-written."

The Defendants then demurred, and aſſigned for cauſes, "that the ſaid indenture here brought into Court and in the ſaid declaration mentioned doth not contain any covenant or warranty of title to or of right power or authority to convey or aſſure the ſaid premiſes in the ſaid declaration mentioned or any part thereof or for the enjoyment of the ſame by the ſaid Plaintiff or his heirs other than againſt the ſaid *J. Wright* deceaſed and his heirs or other perſons claiming under him And for that the ſaid Plaintiff hath not in the ſaid declaration alleged or ſhewn any defect of title to the ſaid premiſes or any part thereof ariſing from or by reaſon of any thing done by the ſaid *J. Wright* or his heirs or any perſon or perſons claiming under him or any eviction interruption moleſtation or diſturbance done committed or occaſioned by the ſaid *J. Wright* or his heirs or any perſon or perſons claiming under the ſaid *J. Wright* And alſo for that the ſaid declaration is in other reſpects defective and inſufficient."

Joinder in demurrer.

Williams Serjt. in ſupport of the demurrer. The great queſtion in this caſe is, Whether the covenant on which the breach is aſſigned ought or ought not to be confined to the acts of *James Wright* and his heirs? We contend, that eviction by a ſtranger is no breach of the covenant. In conſtruing this covenant the Court will collect the intention of the parties, not merely from the words of the covenant itſelf, but by contraſting it with the other parts of the indenture: and it was with the view of enabling the Court to do this that the Defendant prayed *oyer*. The intention of the parties appears to have been, that the words "notwithſtanding any act by him done to the contrary" in the firſt covenant ſhould qualify and reſtrain the ſecond covenant. When the grantor has in the firſt clauſe only covenanted that he was ſeiſed in fee notwithſtanding his own acts, it would be a very ſtrained conſtruction to hold that he intended in the next clauſe to covenant that he had a right to convey, notwithſtanding the acts of all the world. The covenant for title, and the covenant for a right to convey, are ſynonimous covenants, and muſt receive the ſame conſtruction. The meaning of the covenant in queſtion is further explained by the warranty, and by the covenant for quiet enjoyment; the former being only a qualified warranty againſt himſelf and his heirs; and the latter a ſpecial covenant that the grantee ſhall enjoy without interruption

1799.

BROWNING v. WRIGHT.

interruption from him or any perſon claiming under him. It is not an unuſual thing for the Court, in conſtruing covenants, to put a ſenſe upon them which is againſt the words, provided it be warranted by the apparent intention of the parties. Thus in the Earl of *Clanrickard*'s caſe, *Hob.* 273. a covenant for further aſſurance of an eſtate was reſtrained to a third part. In *Broughton* v. *Conway*, *Moore* 58. a condition that the vendor would not do, nor had done any act to diſturb the vendee, but that the vendee ſhould hold and enjoy without the diſturbance of the vendor or any other perſon, was held to be confined to acts done by the vendor, on the ground of the latter words being referable to the former. So in an action on a covenant "that lands were of the value of 1000*l.* "*per annum*, and ſhould ſo continue notwithſtanding any act done "or to be done by the covenantor," the covenant was conſtrued by the reſtrictve words in the ſecond member of the ſentence, and though the lands were not worth 1000*l.* *per annum* at the time of the covenant made, yet as no act was ſhewn to have been done by the covenantor to make them worth leſs, the breach was held ill. *Rich* v. *Rich*, *Cro. Eliz.* 43. Still ſtronger, however, is the caſe of *Nervin* v. *Munns*, 3 *Lev.* 46. There were four covenants: the firſt for ſeiſin in fee; the ſecond for right to convey; the third againſt incumbrances, and the fourth for quiet enjoyment. The firſt, third and fourth, were expreſsly reſtrained to the acts of the grantor, his father and grandfather, and the ſecond was unlimited. The whole Court agreed that the covenants were diſtinct and ſeveral, and three Juſtices, in oppoſition to *North* Ch. J. held that the firſt and ſecond covenants, though diſtinct, were ſynonimous; and therefore, as the grantor had firſt covenanted againſt his own acts, it could not be intended that he ſhould immediately afterwards, in a covenant to the ſame effect, covenant againſt all the world. And they alſo took a diſtinction which will afford an anſwer to all the caſes which may be cited on the other ſide, as well as to *Crayford* v. *Crayford*, *Cro. Car.* 106. and *Hughes* v. *Bennet*, *Cro. Car.* 495. Sir *William Jones*, 403. relied on by *North* Ch. J., namely, that in thoſe caſes the covenants were of divers natures, and concerned different things, although relating to the ſame land.

Shepherd Serjt. *contrà*. The argument of the other ſide amounts to this, that as ſome of the covenants in this deed are of a ſpecial nature, the Court muſt borrow the reſtrictions introduced into them, and engraft them on the general covenant. But this mode of conſtruction cannot be adopted without laying down a general

rule

rule that wherever a covenant againſt the acts of the grantor only is inſerted in a deed, all other covenants, however general, muſt be reſtrained thereby. The queſtion, therefore, muſt be, not whether the Court ſhall borrow from a ſpecial covenant in order to reſtrain a general one, but whether both are not in effect one covenant. The diſtinction ſeems to depend on the words with which the ſecond member of the ſentence is introduced. Thus in *Broughton* v. *Conway*, *Dyer* 240. where the covenant againſt the acts of the covenantor was followed by the words "*but* that the aſſignee may enjoy without diſturbance of *any perſon*;" the Court conſidered the latter words to be only a continuation of the covenant. To the ſame effect is *Piles* v. *Jervies* (*a*), *Dyer* 240. in the margin. Theſe caſes expreſsly proceeded on the meaning of the word "but," and cannot therefore be applied to this caſe, where the ſecond member of the ſentence is introduced by "and that," which disjoins it from the firſt, and makes it a ſeparate and diſtinct covenant. In *Rich* v. *Rich* the covenant ſeems clearly to have contained but one ſentence; and as to Lord *Clanrickard*'s caſe, it cannot apply; for, as only one third part of the eſtate was conveyed, the covenant for aſſurance of the eſtate could only extend to that third part. Of *Nervin* v. *Muns* it is ſufficient to obſerve that, after ſtating a difference of opinion in the Court, it concludes with *ſed adjornatur*. The caſe of Sir *George Trenchard* v. *Hoſkins*, *Winch* 91, 92, 93. was a covenant that there was no reverſion in the Crown notwithſtanding any act done by the covenantor; and the Court held, that the words "notwithſtanding any act done," reſtrained the general ſenſe of two preceding covenants, for ſeiſin in fee and power to ſell. But that caſe was afterwards reverſed, as appears from a manuſcript copy of that book, as well as from 1 *Sid.* 328. though *Saunders*, who was Counſel for the Plaintiff in *Gainsforth* v. *Griffith*, 1 *Saund.* 60. by attempting to diſtinguiſh that caſe on the grounds of the firſt judgment, does not ſeem to have been aware of the ultimate deciſion (*b*). In *Gainsforth* v. *Griffith* it was agreed, that a particular covenant in fact may reſtrain a general covenant in law; as in *Nokes*'s caſe, 4 *Co.* 80. But it was laid down, that an expreſs general covenant in fact cannot be reſtrained by a particular covenant in fact, unleſs

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(*a*) See this caſe ſet out in a note to *Gainsforth* v. *Griffith*, 1 *Saund.* 59. by Mr. Serjt. *Williams*.

(*b*) In *Siderſin* the Court, ſpeaking of that caſe, ſay, "that on a writ of error in *K. B. Jones* and the other Juſtices, except *Whitelock*, held that the Judgment below ſhould be reverſed;" but it is added, *mes fuit dit que nul reverſal fuit enter; ideo quære.*

the latter can be conſtrued as part of the former. Therefore, in a covenant on the aſſignment of a leaſe, that it was a good and indefeaſible leaſe, *and that* the aſſignee ſhould quietly enjoy, *&c.* without any let or diſturbance of the aſſignor, the firſt covenant was held to extend to the act of a ſtranger, unreſtrained by the latter covenant. So where *A.* covenanted that he was ſeiſed in fee notwithſtanding any act by him done, *and that* the lands were of a certain annual value; the latter was held an abſolute covenant, that the lands were of ſuch a value. *Hughes* v. *Bennett*, *Cro. Car.* 495. Sir *Wm. Jones*, 403. S. C. To the ſame effect is *Crayford* v. *Crayford*, *Cro. Car.* 106. a vendor is always at liberty to covenant for ſuch an eſtate as he really has, or for an indefeaſible eſtate; if he adopts the latter method, he muſt be reſponſible accordingly. Thus where *A.* covenanted that he was ſeiſed of a good eſtate in fee according to the indenture made to him by *W.* (of whom he had purchaſed,) the covenant was held abſolute; for the reference to the conveyance by *W.* ſerved only to denote the limitation and quality of the eſtate, and not the defeaſibleneſs and indefeaſibleneſs of the title. *Cooke* v. *Fownds*, 1 *Lev.* 40. 1 *Kel.* 95. S. C. The ſtrongeſt caſe, however, on the conſtruction of covenants to ſecure title, is *Johnſon* v. *Proctor*, *Yelv.* 175. where *A.* having granted the whole of a leaſehold eſtate of which he had but a moiety, and covenanted for quiet enjoyment of it *againſt his own acts*, was, under this covenant, held liable on the entry of thoſe who were entitled to one moiety. The only difference between that caſe and the one on this record is not much in the Defendant's favour, *viz.* that *J. W.* inſtead of having a moiety only, had no eſtate to convey: Should this demurrer prevail, it will eſtabliſh this principle, that wherever there is any one ſpecial covenant in a conveyance, all the general covenants in the ſame deed muſt be reſtrained thereby.

LORD ELDON Ch. J. This caſe comes before the Court on demurrer, under the following circumſtances. The action is brought by *Thomas Browning*, who appears on theſe pleadings to be the purchaſer of an eſtate of inheritance in fee, and it is brought againſt the preſent Defendants who are the perſonal repreſentatives of the vendor *James Wright*, and are bound by certain covenants which are ſet forth upon this record. The Plaintiff declares, that by indenture made on the 12th of *October* 1787 between *James Wright* the teſtator of the Defendants on the one part, and *Thomas Browning* the preſent Plaintiff on the other part, in conſideration of 180*l.* paid, *James Wright* fully, clearly, and abſolutely granted, bargained, ſold, enfeoffed, and confirmed a certain piece of land, deſcribing it. Now theſe words "granted, bargained, ſold, enfeoffed, and confirmed," certainly import a covenant in law, the effect and meaning of which would be affected by the ſubſequent words of the indenture. After the *habendum* to *Thomas Browning*, his heirs and aſſigns, follows this qualified warranty: "And the ſaid *James* and his heirs, the aforeſaid piece of land, *&c.* to the ſaid *Thomas Browning* and his heirs, againſt him the ſaid *James* and his heirs, ſhall and will warrant and for ever defend by theſe preſents." This is not a general warranty againſt all mankind, but againſt the acts of *James Wright* and his heirs only. Then follow certain covenants in theſe words. "And the ſaid *James Wright* for himſelf, his heirs and aſſigns, doth covenant and agree to and with the ſaid *Thomas Browning*, his heirs and aſſigns *in manner and form following*, that is to ſay, That he the ſaid *James Wright* for, and notwithſtanding any thing by him done to the contrary, is lawfully and abſolutely ſeiſed of the ſaid piece, *&c.* hereby granted of a good, ſure, perfect, lawful, abſolute, and indefeaſible eſtate in fee-ſimple, without any manner of condition, limitation, uſe, truſt, or any other reſtraint, matter, or thing whatſoever, to alter, change, charge, defeat, or determine the ſame." Then follows the covenant on which the preſent queſtion ariſes: "*And that* he hath good right, full power, and lawful and abſolute authority to convey and aſſure the ſame to the ſaid *Thomas Browning*, his heirs and aſſigns, *in manner aforeſaid.*" After this comes a covenant concerning a right of way, which has no relation to this caſe, except that it may not be immaterial to obſerve, that this covenant is introduced by the words "And the ſaid *James* for himſelf, his heirs, executors, and adminiſtrators, doth further covenant and agree," which are the initiatory words of the firſt covenant, and which are not uſed at the beginning of what is called the ſecond covenant. Perhaps, this may be conſidered as a critical obſervation in a caſe which does not require it. But as what is called the ſecond covenant is only introduced by the words "And that," and in the third (or what may be called the ſecond) covenant, the name of the covenantor is again introduced as further covenanting, it ſeems to have been the intention of the parties that all the matters which are inſerted before the repetition of the initiatory words ſhould be conſidered as one covenant. This point, indeed, is not neceſſary to the deciſion of the caſe. But even on the

1799.
BROWNING
v.
WRIGHT.

critical obſervation which I have ſuggeſted, it would not be unfair to hold that what has been ſtated at the bar as two covenants, is in fact but one. And if this were granted, there would be an end of the whole argument. The grantor then covenants for the quiet enjoyment of the grantee, "without any manner of let or interruption of the ſaid *James Wright*, or any manner of perſon or perſons claiming under him." So that it is clear, that this covenant does not apply to the acts of any perſons not claiming under *James Wright*; and in this reſpect it agrees with the effect of the warranty, and with the words in the introductory part of the firſt covenant. The laſt covenant is, that *James Wright*, his heirs and aſſigns, and all perſons claiming any eſtate or intereſt to, from, or under him, (which tallies with the warranty, and with the introductory words to the firſt covenant and laſt covenants,) would make ſuch further aſſurance as ſhould be thought neceſſary. It is certainly true, that the words of a covenant are to be taken moſt ſtrongly againſt the covenantor; but that muſt be qualified by the obſervation that a due regard muſt be paid to the intention of the parties as collected from the whole context of the inſtrument. This tranſaction is a purchaſe of an eſtate of inheritance in fee, and the firſt queſtion is, What will be the nature and effect of a conveyance carrying ſuch a contract into execution? If a man purchaſe an eſtate of inheritance and afterwards ſell it, it is to be underſtood *primâ facie* that he ſells the eſtate as he received it: and the purchaſer takes the premiſes granted by him with covenants againſt his acts. If the vendor has taken by deſcent, he covenants againſt his acts and thoſe of his anceſtor; and if by deviſe, it is not unuſual for him to covenant againſt the acts of the deviſor as well as his own. In fact, he ſays, I ſell this land in the ſame plight that I received it, and not in any degree made worſe by me. It was argued, that if this were ſo, a man who has only an eſtate for life, might convey an eſtate in fee, and yet not be liable to the purchaſer. This ſeems at firſt to involve a degree of injuſtice, but it all depends on the fact, whether the vendor be really putting the purchaſer into the ſame ſituation in which he ſtood himſelf. If he has bought an eſtate in fee, and at the time of the re-ſale, has but an eſtate for life, it muſt have been reduced to that eſtate by his own act, and in that caſe the purchaſer will be protected by the vendor's covenants againſt any act done by himſelf. But if the defect in his title depend upon the acts of thoſe who had the eſtate before him, and he honeſtly but ignorantly propoſes to another perſon to ſtand in his ſituation, neither hardſhip or injuſtice can enſue. What is the common courſe of buſineſs in ſuch a caſe? An abſtract is laid before the purchaſer's counſel; and though to a certain extent he relies on the vendor's covenants, ſtill his chief attention is directed to aſcertaining what is the eſtate, and how far it is ſupported by the title. The purchaſer, therefore, not being miſled by the vendor, makes up his mind whether he ſhall complete his bargain or not, and if any doubts ariſe on the title, it reſts with the vendor to determine whether he will ſatisfy thoſe doubts by covenants more or leſs extenſive. *Primâ facie*, therefore, in the conveyance of an eſtate of inheritance, we are led to expect no other covenants than thoſe which guard againſt the acts of the vendor and his heirs. With reſpect to the conveyance of leaſehold eſtates, this is not always ſo, and there is an obvious reaſon why this ſhould not be ſo. Some of the caſes reſt on the diſtinction between freehold and leaſehold property, and in the caſe cited from that excellent book the Reports of *Saunders* made more excellent by a late edition, the eſtate was leaſehold. All the muniments of a freehold eſtate, and every thing which can illuſtrate the title is in poſſeſſion of the vendor; but this is ſeldom the caſe with reſpect to leaſeholds. With regard to many eſtates in this town, held under the Duke of *Bedford* and the Duke of *Portland*, it would be next to impoſſible to ſhew any thing but the leaſe itſelf; the vendors could not produce the muniments of their eſtates which are depoſited in the family cheſts of thoſe noblemen. It ſometimes happens, therefore, that parties require covenants in aſſignments of this kind of property which are not required in conveyances of freehold; ſuch as, an abſolute covenant that the vendor holds a valid and indefeaſible leaſe.

But even where covenants of this kind are introduced, if the words of the deed be that "he covenants in manner and form *aforeſaid*," the Court will look to the former part of the inſtrument in order to aſcertain the ſenſe in which the covenant is to be taken. So in the caſe of *The Duke of Northumberland* v. *Errington and Others* (*a*) where the Defendants covenanted for themſelves "*jointly and ſeverally in manner following*," and the deed was ſo inaccurately drawn, that *primâ facie* ſome of the covenants appeared to be joint, and ſome ſeveral, the Court of *King's Bench* held, that the general intent of the parties was to be conſidered, and that the prior words extended to all the ſubſequent covenants, and made them all joint and ſeveral. In the preſent caſe

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(*a*) 5 *T. R.* 522.

1799

BROWNING v. WRIGHT.

caſe then we have got thus far. It is quite clear with reſpect to the warranty that it was not the intention of the grantor to warrant the title againſt any perſons but himſelf and his heirs. It is equally clear, that it was not his intention to covenant for quiet enjoyment againſt the acts of any but himſelf and his heirs: nor was it his intention to make the covenant for further aſſurance extend to any other perſons. We find all theſe limited covenants in an inſtrument of purchaſe, in which we ſhould not expect obligations of greater extent. Then there is one part of the inſtrument which, if it be taken as a ſubſtantive unconnected covenant, and not part of the firſt covenant, which, however, I think might be done, raiſes the preſent queſtion. It has been argued, that this demurrer cannot be allowed without laying down this principle; that any ſpecial covenant in a deed will reſtrain all the general covenants. If that conſequence would neceſſarily enſue, I admit, that the demurrer is not to be ſuſtained. But, I take that to be an inaccurate ſtatement of the caſe. The queſtion is not whether a ſpecial covenant will reſtrain a general one, but whether the particular covenant on which the action is founded be general or ſpecial. And my opinion, upon conſidering the whole deed, is, that it is a ſpecial one. What would be the uſe of any of the other covenants if this were general? It would be of little ſervice to the grantor to inſiſt that the warranty, and the covenants for quiet enjoyment and further aſſurance, were ſpecially confined to himſelf and his heirs, if the grantee were at liberty to ſay, "I cannot ſue you on theſe covenants, but I have a cauſe of action ariſing upon a general covenant which ſuperſedes them all." It appears to me from the words and context of the deed, that in ſuch caſe we ſhould be driven to ſay, that the grantor intended at the ſame time to give a limited and an unlimited warranty. The true meaning, therefore, of the covenant is, that the grantor has power to convey and aſſure according to the terms uſed, to which terms he refers by the words "in manner aforeſaid;" namely, "for, and notwithſtanding any thing by him done to the contrary."

With reſpect to the caſes which have been cited, it is to be obſerved, that when a general principle for the conſtruction of an inſtrument is once laid down, the Court will not be reſtrained from making their own application of that principle, becauſe there are caſes in which it may have been applied in a different manner (*a*). The principle being once acknowledged, the only difficulty

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(*a*) The ſame doctrine was laid down by Lord *Kenyon* in the caſe of *Lord Walpole* v. *Lord Cholmondeley*, 7 *T. R.* 148.

difficulty conſiſts in making the moſt accurate application of it. In *Trenchard's* caſe, the eſtate on which the covenants in queſtion aroſe was granted under letters patent by the crown; but thoſe letters patent are not ſtated in any of the reports. We know, however, that in grants of lands by the crown, it is uſual to reſerve a reverſion, which reverſion the grantee cannot bar. The grantee having enjoyed the eſtate for a conſiderable time, ſold to the Plaintiff in the action, and entered into three covenants. Firſt, that he was ſeiſed in fee: ſecondly, that he had good power to convey; and thirdly, that there was no reverſion in the crown *notwithſtanding any act done by him.* The conteſt in the cauſe was to apply the concluding words of the third covenant to the two prior covenants: there was a great difference of opinion upon the ſubject, not only between the individual Judges, but between the different Courts before whom it was argued; and the only ground upon which I can ſuppoſe that Court to have proceeded, which decided that the words were not connected with the firſt covenant is this, that they conſidered it to have been the intention of the parties that the vendor ſhould enter into an abſolute covenant for his ſeiſin in fee in all caſes but one; namely, that he ſhould not be liable on the objection of a reverſion exiſting in the Crown, unleſs that reverſion appeared to have been veſted in the crown by his own acts. The caſe of *Johnſon* v. *Proctor*, in *Yelverton*, proceeded on the principle on which this demurrer may be decided, *viz.* that the covenant is to be conſtrued according to the intention of the parties. There the grantor having ſtated in the recital that he was intereſted in the whole of the premiſes, when in fact he was intereſted in a moiety only, the Court would not permit him to contend that a covenant for quiet enjoyment "notwithſtanding any act done by him," was ſatisfied by a compliance with the mere words of that covenant in a caſe where the grantee had ſuffered eviction not in conſequence of any act done by the grantor, but in conſequence of the badneſs of his title. The recital itſelf amounted to a warranty. *Gainsforth* v. *Griffith* was a caſe of leaſehold property. The firſt covenant there was, for an indefeaſible title, and was a ſeparate and diſtinct covenant; and the ſecond was for quiet enjoyment, notwithſtanding the aſſignor's own acts. He ſeems, therefore, to have ſaid, I not only covenant for the goodneſs of my title, but that you ſhall enjoy under that title without any interruption from me. The nature of the aſſurance ſhews it to have been the intent of the parties that the words in the laſt covenant ſhould not attach upon the firſt. Coming lately from a Court of Equity, I may be allowed to refer to a caſe there, though perhaps not of the higheſt authority in a Court of Law. It is the caſe of *Fielder* v. *Studley*, *Caſ. temp. Finch* 90. There the deed contained one general covenant for lawful power to convey, but all the other covenants had reſtrictive words as here. The grantee having ſued the grantor on the general covenant, the Court of Chancery reſtrained him from proceeding. Now this muſt have been done on the ground of the intent of the parties appearing on the inſtrumhnt; ſince that intent, and the conſequent legal effect of the inſtrument, could only be collected from the inſtrument itſelf, and not from any thing *dehors*. In the ſame manner the intent of the parties to the covenant on which this action is brought is to be collected from the warranty, from the other covenants, and from the *primâ facie* nature of a purchaſe of a freehold eſtate. Upon the whole I am clearly of opinion, that this is not a covenant againſt all the world, but that it is either part of the firſt covenant which is ſpecial, or if a ſubſtantive covenant, muſt by reference to the whole context of the deed be conſidered a ſpecial covenant.

BULLER J. My Lord has ſo completely exhauſted the caſe that I need do little more than ſubſcribe my general aſſent. Some things are extremely clear. In the conſtruction of agreements and covenants, the intention of the parties is principally to be attended to. In conveyances of this ſort, the uſage of the profeſſion alſo deſerves conſiderable attention. According to the ancient mode of conveyance, deeds were confined to a very narrow compaſs. The words "grant and enfeoff" amount to a general warranty in law, and have the ſame force and effect. The covenants, therefore, which have been introduced in more modern times if they have any uſe beſides that of ſwallowing a quantity of parchment, are intended for the protection of the party conveying; and are introduced for the purpoſe of qualifying the general warranty which the old common law implied. This has been clearly ſettled ever ſince *Noke*'s caſe. We do not do juſtice to the parties unleſs we look to the whole deed, and infer from that their real intention. Covenants being intended for the benefit of the party conveying, let us ſee how this Defendant has protected himſelf? He has expreſsly told us in one part of the deed that he means to covenant againſt his own acts, and are we to ſay, that he has in the ſame breath covenanted againſt the acts of all the world? This would be highly inconſiſtent. If the Court is driven to ſay that theſe two covenants muſt ſtand together, they muſt do ſo by pronouncing judgment on the words of this particular clauſe, and ſhutting their eyes againſt all the other parts of the deed. I am inclined to think that the perſon who drew this deed intended that the two clauſes ſhould form but one covenant: but that not having ſtrength of mind ſufficient to carry him through one continued ſentence of ſo great a length, he ſtopped, and introduced the words "And that" which have created all the difficulty. Srike out theſe words and the caſe is as clear as the ſun. The covenant would then ſtand thus: The grantor covenants that notwithſtanding any act done by him, he is ſeiſed of the eſtate, and hath good title to convey. The two clauſes are ſynonymous. Many words have been uſed, though they mean but one thing. The grantor has ſaid I have a good right to convey. Take this to be againſt all the world. He has alſo qualified the aſſertion that he is ſeiſed in fee by the expreſſion "notwithſtanding any act by him done;" why ſay notwithſtanding any act by him done, if he meant to covenant againſt the acts of all the world. The reſtriction would be inconſiſtent. To make ſenſe of the deed, therefore, we muſt read theſe two ſentences as one covenant. It is often difficult to diſtinguiſh between the words of the conveyancer, and thoſe of the party conveying. In this caſe, however, I think it may fairly be inferred that the grantor intended only to ſell what he had bought, leaving it to the purchaſer to exerciſe his diſcretion reſpecting the title.

Heath J. I am of the ſame opinion; and ſhall expreſs my reaſons for that opinion very ſhortly. I take this caſe to be very clear on the conſtruction of the inſtrument. Where any ſentence contains diſtinct covenants, and there are words of reſtriction either in the prefatory or concluding part, thoſe words muſt be extended to every part of the ſentence unleſs the intention of the parties appear to require a contrary conſtruction. This is laid down in 1 *Saund.* 60. It therefore behoves the Plaintiff to ſhew, that it was the intention of the parties that the reſtrictive words in this caſe ſhould not extend to the ſecond clauſe of the ſentence. It is certainly poſſible that this might have been the intention. The purchaſer might have entertained ſuſpicions of the title, and might therefore have required a general covenant. But in order to aſcertain whether this were ſo, we muſt examine the other parts of the deed; and the other parts of the deed negative that idea. The ſecond clauſe is conſequential to the firſt. The firſt aſſerts, that the grantor is ſeiſed of an eſtate in fee, notwithſtanding any act done by him; and the ſecond, that he has good right to convey the eſtate of which he is ſeiſed.

Rooke J. I have entertained ſome doubts upon this queſtion: but upon the whole of the argument, I am now ſatisfied that the judgment of the Court muſt be directed by the intent of the parties; and that the intent ſufficiently appears. But as the caſe has been very fully diſcuſſed, I ſhall only add, that the two clauſes appear to me to conſtitute but one covenant, and that the reſtraining words muſt be applied as well to that member of the ſentence which aſſerts that the grantor is lawfully ſeiſed, as to that which aſſerts that he has a right to convey.

Judgment for the Defendant.

Nov. 15*th.*

Hall *v.* Ody.

The coſts of two actions between the ſame parties though in two different courts may be ſett off againſt each other. And in *C. B.* this may be done notwithſtanding the lien of the Attorney for his coſts.

Cockell Serjt. this day ſhewed cauſe againſt a rule *niſi* for ſetting off the coſts of an action of ejectment recovered by the preſent Defendant againſt the preſent Plaintiff in the *King's Bench*, againſt the coſts of an action of treſpaſs in this Court, in which the plaintiff had recovered a verdict; and inſiſted that in all the caſes where a ſet off of this kind had been allowed, both actions had been in the ſame court; as in *Thruſtout* d. *Barnes* v. *Crafter*, 2 *Bl.* 826. *Schoole* v. *Noble* and others, 1 *H. Bl.* 23. *Nunez* v. *Modigliani*, 1 *H. Bl.* 217. *Vaughan* v. *Davies*, 2 *H. Bl.* 440. and *Dennie* v. *Elliott*, 2 *H. Bl.* 587. (*a*) But the *Court* overruled the objection, ſaying that a ſet off had even been allowed between coſts in a court of equity, and coſts in a court of law; and *Heath* J. obſerved, that he remembered a caſe where an ejectment having been brought in the *King's Bench*, and afterwards a *formedon* in this court, proceedings were ſtayed in the latter until the coſts of the former were paid.

Cockell Serjt. then ſtated that he oppoſed the rule on the part of the Plaintiff's attorney who had not been paid his coſts, and repreſented that the Plaintiff himſelf was now in priſon. He cited *Mitchell* v. *Oldfield*, 4 *T. R.* 123. to ſhew that the attorney has a lien on the judgment for the amount of his coſts (*b*).

(*a*) See alſo *O'Connor* v. *Murphy*, 1 *H. Bl.* 657.

(*b*) Alſo *Randle* v. *Fuller*, 6 *T. R.* 457.

Shepherd Serjt. *contrà*, relied on *Dennie* v. *Elliott*; where it was held, that whatever might be the rule in the *King's Bench*, yet according to the practice of this Court the lien of the attorney was ſubject to the equitable claims of the parties.

Lord ELDON Ch. J. Finding it to be the practice of this Court that an attorney ſhall not take his coſts out of the fund, which by his diligence he has recovered for his client, where the oppoſite party is entitled to a ſet off, it does not become me to ſay more than that I find it to be the ſettled practice with much ſurprize, ſince it ſtands in direct contradiction to the practice of every other court as well as to the principles of juſtice. In the Court of Chancery the ſame parties are often concerned in many ſuits, and I never knew the idea entertained of arranging the funds till the reſpective attornies were paid their coſts. However, as the attorney in this caſe has acted with a knowledge of the ſettled practice of the Court, he can have no right to claim the advantage of a more juſt principle; and it will only remain for the Court to conſider, whether the practice of the court of *King's Bench* ſhould not be adopted here for the future.

HEATH J. I have no objection to have the practice reconſidered.

ROOKE J. There can be no objection to reconſidering the practice, but it does not appear to me to be unfair as it ſtands at preſent. The attorney looks in the firſt inſtance to the perſonal ſecurity of his client, and if beyond that he can get any farther ſecurity into his hands, it is a mere caſual advantage.

Rule abſolute.

PARKER, One, &c. *v.* VAUGHAN and Others.

Nov. 15.

If an attorney of *C. B.* bring an action by original in that court, againſt a Defendant reſident in *Middleſex*, and recover under 40*s*. the Court will allow a ſuggeſtion to be entered under 23 *Geo.* 2. *c.* 33. of *Middleſex*.

THIS was an action for uſe and occupation, in which the Plaintiff, who was an attorney of this court, ſued by original, and obtained a verdict for 1*l.* 1*s.*

Shepherd Serjt. on a former day obtained a rule *niſi* for entering a ſuggeſtion on the roll according to the proviſions of 23 *Geo.* 2. *c.* 33. *ſ.* 19. on the ground of the Defendant being reſident in *Middleſex* and liable to be ſummoned to the county court.

Cockell Serjt. now ſhewed cauſe againſt that rule on two grounds: Firſt, becauſe the Plaintiff was an attorney of this court, and was therefore

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ſ. 19. An action for uſe and occupation may be brought in the county court

1799.

Parker *v.* Vaughan.

therefore entitled by his privilege to ſue in this court; in ſupport of which he cited *Gardner* v. *Jeſſop*, 2 *Wilſ*. 42. where it was ruled on demurrer that an attorney cannot wave his privilege, becauſe he is not allowed it for the benefit of himſelf but for the ſake of the Court and the ſuitors. [Rooke J. That was the caſe of an attorney Defendant; here the attorney is Plaintiff, and ſues without naming himſelf attorney.] Secondly, becauſe this being an action for uſe and occupation, could not be brought in the county court; and he referred to *Woolley* v. *Cloutman*, *Doug*. 245. where the words "debt for rent" in the *London* court of conſcience act 3 *Jac*. 1. *c*. 15. *ſ*. 1. 6. were held to extend to all actions for rent.

Shepherd contrà inſiſted, firſt, That the attorney in this caſe having omitted to ſue by attachment of privilege, had waved his privilege; and cited *Hethrington*, One, *&c*. v. *Lowth*, 2 *Str*. 837. and *Welland*, One, *&c*. v. *Frument*, *Barnes* 479. Secondly, That the caſe of *Woolley* v. *Cloutman* having proceeded entirely on the particular words of the *London* court of conſcience act, was not applicable to this; and that the juriſdiction of the *Middleſex* county court extended to all caſes not expreſsly excepted. He cited *Keay* v. *Rigge*, *ante*, vol. i. p. 11.

Cockell then urged, that as the application for a ſuggeſtion was made on affidavit, the Plaintiff was entitled to ſhew by affidavit that he was an attorney.

Lord Eldon Ch. J. The only affidavit which the Plaintiff could make in order to give a reaſon for his ſuing in this court muſt be, that he ſued as an attorney: but it appears on the record that he did not ſue as an attorney. On the ſecond point, alſo, the Court are of opinion that the Plaintiff might have ſued in an action for uſe and occupation in the county court.

Per Curiam, Rule abſolute (*a*).

(*a*) *Vide Tagg* v. *Madan*, *ante*, vol. i. p. 629. and the caſes there cited.

Nov. 16th.

Nation *v.* Barrett.

In this court two days notice of juſtification muſt be given whether the bail originally put in, or added bail, be brought up.

The juſtification of bail in this caſe was oppoſed by *Shepherd* Serjt. on the ground of two days' notice of juſtification not having been given.

Williams Serjt. contended that ſuch notice was not neceſſary where the ſame bail were brought up to juſtify as were originally put in; though in the caſe of added bail it was. He obſerved that the diſtinction was founded in good ſenſe; for the Plaintiff was ſuppoſed not to except to bail originally put in without having inquired into their ſufficiency; and ſaid that the practice of the *King's Bench* was in his favour (*a*).

The Court finding all the officers of opinion that the practice of this court was otherwiſe (*b*), held it too well ſettled to be now ſhaken, and rejected the bail.

COOK *v.* LOVELAND and Another.

Nov. 18th.

The crown by letters patent granted to the maſter and wardens of the corporation of bakers, (there being four wardens,) by themſelves and their deputy or deputies, full power to overlook and correct the trade of baking. Held, that the maſter and one warden could not juſtify entering the houſe of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of the perſons to whom the power was given; and if they acted as deputies, it ſhould have appeared that they were appointed by the majority.

TRESPASS for breaking and entering the dwelling-houſe of the Plaintiff, ſituate in *Commerce Row*, *Blackfriars Road*, in the Pariſh of *Chriſtchurch*, in the county of *Surry*, and continuing therein a long ſpace of time, *to wit*, the ſpace of one hour, and throwing about, pulling about, and damaging divers loaves of bread of the ſaid Plaintiff in his dwelling-houſe, &c.

Pleas. Firſt, Not-guilty. Second, As to the ſaid breaking and entering the ſaid dwelling-houſe of the ſaid Plaintiff, in the ſaid declaration mentioned, and continuing there ten minutes, parcel of the ſaid term, in the ſaid declaration mentioned; and as to the throwing about and pulling about the ſaid loaves of bread in his ſaid dwelling-houſe in the ſaid declaration mentioned the ſaid *Thomas* and *John* by leave, &c. *actionem non*, becauſe they ſay that the ſaid Plantiff before and at the time when, &c. uſed and exerciſed the trade and myſtery of a baker, baking bread to be expoſed to ſale, and expoſed bread to ſale at his ſaid dwelling-houſe at the pariſh aforeſaid, in the county aforeſaid, and that the ſaid dwelling-houſe of the ſaid Plaintiff, wherein he ſo uſed and exerciſed the trade and myſtery of a baker, and made bread and expoſed the

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(*a*) *Wright* v. *Ley*, *H.* 15 *Geo* 3. *B. R.* Notice in an evening to juſtify bail the next day is good, if the bail have before been put in and excepted to by the Plaintiff; otherwiſe not. *Vide etiam* to the ſame effect. *Tidd's Pr. K. B.* 138, 139. *ed.* 1. 136. *ed.* 2.

(*b*) *Teale* v. *Cheſhire*, *Barnes* 82. and *Gregory* v. *Reeves*, *Barnes* 303.

ſame to ſale, is ſituate within two miles of the ſuburbs of the city of *London*, and is not ſituate within the city of *Weſtminſter*, or the liberties thereof: And the ſaid *Thomas* and *John* further ſay, that the late ſovereign Lady *Elizabeth* Queen of *England*, by her letters patent bearing date the 26th *May*, in the eleventh year of her reign, for herſelf, her heirs and ſucceſſors, ordained, that all the freemen of the city of *London* of the art or myſtery of bakers, in the ſaid city of *London*, and all the freemen of the ſaid city, as well of the white bakers, as of the brown bakers, and all others occupying or uſing within the ſaid city or its ſuburbs, or any of them, the myſtery or art of baking any bread of any ſort to be expoſed to ſale for the regulation and ordering of the ſaid art or myſtery, from thence for ever ſhould be, by virtue of the ſaid letters patent, a body corporate and politic, in deed, fact, and name, by the name of the maſter, wardens, and commonalty of the myſtery of bakers of *London*, and from thence for ever, ſhould by that name have perpetual ſucceſſion, ſue and be ſued, and have a common ſeal: And the ſaid Queen did by the ſaid letters patent for herſelf, her heirs and ſucceſſors, grant to the ſaid maſter, wardens, and commonalty, or their ſucceſſors, that from thenceforth for ever there ſhould be *one maſter of the ſaid myſtery and four guardians* thereof to be choſen, named, and appointed as in the ſaid letters patent is more fully ſet forth: And the ſaid Queen did further of her free grace, certain knowledge, and mere motion, will, and by the ſaid letters patent, grant for herſelf, her heirs, and ſucceſſors, to the ſaid maſter, wardens, and commonalty, and their ſucceſſors, that the *maſter and wardens for the time being, and their ſucceſſors* for ever, ſhould have, enjoy, and exerciſe *by themſelves or their ſufficient deputy or deputies* within the ſaid city and the ſuburbs thereof, and *in all other places within two miles every where round the ſuburbs of the ſaid city of London*, the full and entire overlooking, examination, correction, puniſhment, and government of the ſaid myſtery and commonalty of freemen of the ſaid myſtery, and of all other freemen of the ſaid city of *London* and ſuburbs thereof, and of all and ſingular other ſtrangers, as well within as without the ſaid ſuburbs, uſing the art or myſtery of bakers, making and expoſing to ſale any ſort of bread within the ſaid city or the liberties and ſuburbs thereof, and of all other ſtrangers, of what ſort ſoever, in any way exerciſing or uſing the art and myſtery of a baker within the ſaid city and ſuburbs, or any of them, or elſewhere, in any other place not diſtant more than two miles from the ſuburbs of the ſaid city of *London*, (the ſaid Queen's city of *Weſtminſter*, and the liberties thereof only excepted,) according to their ſound diſcretion as by the ſaid letters-patent now remaining of record in his Majeſty's High Court of Chancery at *Weſtminſter*, reference being thereunto had, may more fully appear, which ſaid letters patent were afterwards and after the granting thereof (*to wit*) on the ſame day and year and aforeſaid *by the perſons to whom they were directed, accepted*, that is to ſay, at the pariſh aforeſaid, in the county aforeſaid. And the ſaid *Thomas* and *John* further ſay, that before, and at the time when, &c. the ſaid *Thomas was maſter of the ſaid myſtery, and that one* Andrew Wright *was one of the wardens thereof, to wit*, at, &c. And the ſaid *Thomas* and *John* further ſay, that the ſaid Thomas *and the ſaid* Andrew Wright *being ſuch maſter and warden of the ſaid myſtery*, and the ſaid Plaintiff ſo exerciſing and uſing the art or myſtery of a baker as aforeſaid, they the ſaid *Thomas* and the ſaid *Andrew Wright* for the purpoſe of overlooking the ſaid Plaintiff in his ſaid art and myſtery of a baker, and of examining whether the bread by him baked and expoſed to ſale in his ſaid dwelling houſe was of a proper and ſufficient weight according to law, and the ſaid *John* as their ſervant in their aſſiſtance, and by their command, at the ſaid time, when, &c. entered the ſaid dwelling-houſe of the ſaid Plaintiff, ſituate in the pariſh and county aforeſaid, in which he ſo uſed and exerciſed his art and myſtery of a baker, and expoſed bread ſo by him baked to ſale, and then and there took down, and took hold of, and weighed parcel of the ſaid bread, ſo being there expoſed to ſale as they lawfully might for the cauſe aforeſaid, and in ſo doing did neceſſarily ſtay and continue the ſpace of ten minutes in the ſaid dwelling-houſe as they lawfully might for the cauſe aforeſaid, which are the ſaid treſpaſſes in the introductory part of this plea ſet out. And this, &c. wherefore, &c.

To this there was a general demurrer and joinder.

Runnington Serjt. in ſupport of the demurrer. Firſt, it does not appear that the Defendants had any authority to enter the Plaintiff's houſe; for ſuch an authority can not be incident to the power of overlooking, &c. given by the charter, ſince even if it had been given in expreſs terms, it would have been void. If derived from cuſtom ſuch an authority might poſſibly be good, for the diſtinction is taken in the caſe of the city of *London*, 8 *Co.* 125. *a.* that *fortior et potentior eſt vulgaris conſuetudo quam regalis conceſſio*, and accordingly it is there ſtated that there is a cuſtom of *London*

1799.

Cook
v.
Loveland.

"to enter a houſe of another which is his caſtle (*a*)." Beſides the plea ſtates, that the defendant expoſed the bread to ſale *at* his houſe; the Defendants therefore might have overlooked it without entering the houſe. Secondly, it appears, that the perſons incorporated by the charter were all the freemen of the city of *London*, uſing the myſtery of baking within the city and its ſuburbs; they were the only perſons to whom the charter was directed, and by them only therefore can it have been accepted. *Rex* v. *Amery*, 1 *Term Rep.* 584. *per Aſhhurſt* J. But the authority given by the charter is not only to be exerciſed within the city and the ſuburbs, but in all other places within two miles everywhere round the city. To the perſons without the city the charter was not directed, by them therefore it was not accepted, and conſequently they cannot be bound by it (*b*). *Bagge*'s caſe, 1 *Roll. Rep.* 226. 2 *Brownlow* 100. and *Rex* v. *Dr. Aſkew*, 4 *Bur.* 2200. It is clear from the pleadings, that the Plaintiff's houſe is not within the city or the ſuburbs, the venue being laid at *Chriſt Church*, in *Surrey*, and the plea averring the houſe to be "within two miles of the ſuburbs of the city." Thirdly, the authority has not been ſtrictly purſued. The charter created one maſter and four wardens, and the authority is to be executed by the maſter and wardens for the time being "by themſelves or their ſufficient deputy or deputies;" admitting therefore, that a majority of five might have exerciſed the authority, yet the treſpaſs in this caſe being only juſtified as the act of the maſter, one of the wardens and a third perſon in their aid, the juſtification is inſufficient. Nor can theſe perſons be conſidered as deputies of the five, ſince if there was a deputation, it ſhould have appeared to have been made by the concurrent appointment of the five, or at leaſt of the majority. In 1 *Bulſt.* 105. where a writ was directed to eight *nominatim* and ſeven only certified, it was held to be bad (*c*).

Shepherd Serjt. *contrà* was deſired by the Court to argue the laſt objection, as they ſhould not feel themſelves called upon to decide

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(*a*) In 1 *Lev.* 15. it is ſaid by the Court that the cuſtoms of *London* are of ſuch force that they will ſtand good againſt negative acts of parliament.

(*b*) But a corporation enabled by charter to make by-laws for the regulation of a particular trade in a particular place, may make by-laws binding on perſons exerciſing that trade in that place, though not members of the corporation. *The Butchers' Company* v. *Morey*, 1 *H. Bl.* 370.

(*c*) In *Norris* v. *Staps*, *Hob.* 210. a declaration in the name of *A.* and *B.* guardians, and the fellowſhip of, &c. on a by-law made by two guardians, and the majority of the fellowſhip, was held bad among other reaſons, becauſe it did not ſtate how many guardians were appointed by the charter, and there might have been more than two.

upon the others, if that was well grounded. He admitted that where a power is granted to a definite number of perſons, it muſt be exercifed by the majority, but contended, that the Defendants in this caſe acted miniſterially as the agents and ſervants of the maſter and wardens, that they entered the Plaintiff's houſe with a view to overlook only, and that their act was afterwards to be ſubmitted to the judgment of the majority of perſons to whom the power was granted; that it might be collected from the plea that they were only acting as deputies of the others, and that although no deputation was averred, ſuch omiſſion could only be taken advantage of on ſpecial demurrer.

But *the Court* were of opinion, that the omiſſion was a ſubject of general demurrer, for the authority was void if the deputies were not well appointed.

LORD ELDON Ch. J. This declaration calls upon the Defendants to ſhew by what authority they entered the Plaintiff's premiſes. The plea refers to the letters patent of incorporation, and aſſerts that the Defendants had authority in manner and form therein deſcribed; that is, a right of overlooking and correcting the trade. Now, it is obvious, that on a queſtion, whether bread be wholeſome and ſound, perſons may differ in opinion, and a tradeſman is not to be ſubject to the judgment of a ſingle perſon, where the authority is veſted in ſeveral. With reſpect to the right of exerciſing that authority by deputy, the ſame joint diſcretion muſt be employed in appointing the deputy which is neceſſary to the execution of the authority itſelf.

Per Curiam, Judgment for the Plaintiff (*a*).

(*a*) *Vid. et. Grinley* v. *Barker and Others, ante*, vol. I. p. 229.

PARIENTE *v.* PLUMBTREE.

Nov. 18th.

The ſheriff having arreſted a party permitted him to go at large without taking a bail bond, returned *cepi corpus*, and before the expiration of the rule to bring in the body put in bail: held that he was not liable either to an action for an eſcape, or falſe return.

THIS was an action on the caſe againſt the Defendant as ſheriff of *Kent*. The firſt count of the declaration complained that the Defendant having arreſted one *W. J. Stephens*, at the ſuit of the Plaintiff, on a *capias ad reſpondendum* returnable in eight days of *Saint Hilary*, indorſed for bail 141*l.* 1*s.* 6*d.* ſuffered him to eſcape, and falſely returned *cepi corpus*; and the ſecond count, that he neglected to arreſt *W. J. Stephens* on the *capias ad reſpondendum*, and falſely returned *cepi corpus*.

The cauſe was tried before *Rooke* J. at the *Weſtminſter* ſittings after laſt *Trinity* Term, when it appeared in evidence that the Defendant had actually arreſted *W. J. Stephens* in obedience to the writ, but had afterwards ſuffered him to be at large without having taken a bail bond; that the Plaintiff on the return-day ruled the Defendant to return the writ, who accordingly returned *cepi corpus*; that the Plaintiff having afterwards ſerved the Defendant with a rule to bring in the body he put in bail, and *W. J. Stephens* before the expiration of the latter rule ſurrendered himſelf in diſcharge of thoſe bail. A verdict was found for the Plaintiff, with liberty to the Defendant to move to ſet it aſide.

Accordingly a rule *niſi* for a new trial having been obtained,

Shepherd and *Bayley* Serjts. now ſhewed cauſe. Before the 23 *H.* 6. *c.* 9. the ſheriff was bound to have the body at the return of the writ; and ſince that ſtatute the only ſufficient excuſe which he can offer for not having the body is, that he has taken a bail-bond. In this caſe he neither had the body at the return of the writ, nor had taken a bail-bond. Though the Plaintiff may proceed againſt the ſheriff in ſuch a manner as to make him liable to an attachment, yet his right of action commences at the time when the writ is returnable, and nothing will wave that right. Indeed it is neceſſary to rule the ſheriff to return the writ, in order to procure evidence to ſupport this action, for without ſo doing the Plaintiff could not aſcertain what return the ſheriff would make: and the ſame thing is done in caſes where the ſheriff is proceeded againſt for extortion or any other miſconduct. If the ſheriff omit to take a bail-bond before the return of the writ, he cannot afterwards retake the party; for the writ is *functus officio*, and he will be guilty of a treſpaſs if he attempt it. *Atkinſon* v. *Matteſon*, 2 *T. R.* 172. Where a bail-bond has been taken, and the ſheriff is afterwards irregular, the Court never allows the Defendant to try the cauſe, without directing the bail-bond to ſtand as a ſecurity. Now in this caſe the Defendant will be permitted to try, and yet there is no bail-bond to ſtand as a ſecurity. Merely putting in bail at a time ſubſequent to the return, cannot be deemed having the body at the return of the writ: and as it appeared by the bail-piece, when produced in evidence, at what time the bail was put in, the Court cannot preſume the proceedings of the ſheriff to have been regular when the contrary has been ſhewn. In *Jones* v. *Eamer*, *Anſtr.* 675, it was expreſsly decided in the *Exchequer*, that putting in bail after the return of the writ, and before the rule to bring in the body had expired, was no defence to an action againſt the ſheriff for returning *cepi corpus* where he

1799.

PARIENTE
v.
PLUMBTRE.

had permitted the Defendant in the original action to go at large without taking a bail-bond, and had him not at the return of the writ. That caſe proceeded on the authority of *Ellis* v. *Yarborough*, 1 *Mod.* 227.

Cockell and *Runnington* Serjts. *contrà* were ſtopped by the Court.

Lord ELDON Ch. J. In *Fuller* v. *Preſt*, 7 *T. R.* 109, it was decided by the Court of *King's Bench*, that where the ſheriff permits the party to go at large and does not take a bail-bond, it is a breach of his duty for which he is anſwerable, if bail are not put in within due time. The reſult of this caſe is, that putting in bail in due time is an anſwer to the action, and that he is only liable where he has not done ſo. I cannot conceive on what grounds the caſe in the *Exchequer* was decided.

BULLER J. I never knew a more groundleſs application: the whole of the argument proceeds on a fallacy. The foundation of it is, that the party did not appear at the return of the writ. But the record does not ſhew at what period bail were put in. When once put in they are to be conſidered as bail of the term generally. In the report of *Jones* v. *Eamer*, the Court are ſaid to have proceeded on the authority of *Ellis* v. *Yarborough*, as directly in point. But that caſe was determined upon another ground. The object of ruling the ſheriff to return the writ is to aſcertain whether he has taken the party or not; and if he return *cepi corpus* he muſt put in bail. Now if this action could be maintained it would in fact be going to a jury to aſcertain whether the Court has done right in giving the ſheriff the uſual time to put in bail. It is a ſufficient anſwer to the action that an appearance was entered. As to the production of the bail-piece at the trial; that was evidence which ought not to have been admitted, and yet it is upon that evidence that the action is attempted to be ſupported. There is a caſe in *Saunders* where it is ſaid by the Court, that if the ſheriff take a priſoner and detain him in his cuſtody, and at the return of the writ return *cepi corpus* and have not the body in court he ſhall be amerced to the King, but the party ſhall not have an action againſt him (*a*).

(*a*) *Poſterne* v. *Hanſon and Another*, 2 *Saund.* 60. The above obſervation was made by the Court with a view to ſhew, that where a ſheriff takes a bail bond, and has not the body at the return of the writ, he is not liable to an action. They reaſon thus. Before the ſtat. 23 *H.* 6. *c.* 9. if the ſheriff had actually *detained* the party, but had him not in Court at the return of the writ, he could only have been amerced, and ſince that ſtatute he is to be conſidered in the ſame condition, after taking a bail-bond, as if he had actually *detained* the party. But in the principal caſe the ſheriff neither took a bail-bond, nor had the Defendant in cuſtody.

1799.

PARIENTE v. PLUMBTRE.

HEATH J. There is a caſe of *Murray* v. *Durand* in *Eſpinaſſe*'s Caſes at *Niſi Prius* (*a*), which ſhews that this action cannot be maintained: for Lord *Kenyon* there ruled that an allowance of bail above, ſubſequent to the commencement of an action againſt the ſheriff for an eſcape, and for not aſſigning the bail-bond, was a ſufficient anſwer to ſuch action; ſaying, that though the bail were put in and juſtified after the proper time, ſtill that when once put in and juſtified they were ſubſiſting bail and muſt be taken *nunc pro tunc*.

ROOKE J. of the ſame opinion.

Rule abſolute.

(*b*) Page 87.

JONES *v.* ARMYTAGE.

Nov. 18th.

Copy of a writ againſt *William Armytage*: notice to appear "*Catherine Waller*, you are ſerved," *&c.* the miſtake held fatal.

THE Defendant in this caſe having been ſerved with a copy of the proceſs, and notice to appear at the foot thereof, as required by 5 *Geo.* 2. *c.* 27. *ſ.* 4., the latter varied from the former, thus; in the copy of the writ the name of the Defendant *William Armytage* was properly inſerted, but the notice was "*Catherine* "*Waller* you are ſerved, *&c.*" On this ground, *Shepherd* Serjt. on a former day obtained a rule *niſi* to ſet aſide the proceedings, and *Runnington* Serjt. now ſhewed cauſe.

The Court were of opinion, that the miſtake was fatal.

Rule abſolute.

TURNER *v.* BRISTOW.

Nov. 18th.

If bail be brought up on the ſame day on which an attachment has been obtained againſt the ſheriff, the Court will permit them to juſtify, and ſet aſide the attachment on payment of coſts.

THE Rule to bring in the body having expired on the 16th (*Saturday*) *Shepherd* Serjt. obtained an attachment this morning (*Monday*). *Heywood* Serjt. now mentioned that he was inſtructed to juſtify bail this day, and urged, that the Court would therefore ſet aſide the attachment, as it had been often ſaid, they would not allow any advantage to be obtained by mere priority of motion. He cited *Thorold* v. *Fiſher*, 1 *H. Bl.* 9. to ſhew, that had he juſtified before the motion for the attachment, the latter would not have been granted.

The Court ſaid, that on payment of coſts (*a*), the attachment muſt be ſet aſide.

(*a*) Note, the rule for the attachment had not been drawn up, and it was intimated that it ought not to be drawn up; ſo that the coſts given were only thoſe of preparing for the rule for the attachment.

1799.

JORY *v.* ORCHARD.

Nov. 18th.

If a Plaintiff's attorney previous to bringing an action for a diſtreſs under the warrant of a magiſtrate, make out two papers preciſely ſimilar, purporting to be demands of a copy of the warrant purſuant to 24 *G.* 3. *c.* 4. *ſ.* 6. and ſign both for his client, and then deliver one to Defendant, the other will be ſufficient evidence at the trial.

TRESPASS for taking and driving away the Plaintiff's cattle.

The cauſe was tried before *Groſe* J. at the laſt Summer aſſizes for *Cornwall*, when it appeared that the Defendant took the cattle as a diſtreſs for non-payment of a poor-rate, by virtue of a warrant from a magiſtrate, which was produced and read. The counſel for the Defendant then called on the Plaintiff to prove a demand of a copy of the warrant purſuant to 24 *Geo.* 2. *c.* 44. *ſ.* 6. (*a*) upon which a paper was produced by a witneſs, who ſwore that it was a copy of the demand of the warrant. It was objected, however, that ſuch copy could not be read in evidence without proof of notice given to the Defendant to produce the original: in anſwer to which, it was ſhewn, that the Plaintiff's attorney intending to deliver a demand under the above act, made out two papers for that purpoſe preciſely to the ſame effect, and ſigned them both for his client; one of which he delivered to the Defendant, and the other, which was the paper now produced, he kept in his own poſſeſſion. This the learned judge refuſed to receive, becauſe no notice had been given to produce the demand delivered to the Defendant, which he thought the beſt evidence; accordingly he directed a nonſuit.

A rule *niſi* having been obtained upon a former day for ſetting aſide this nonſuit,

Bayley Serjt. now ſhewed cauſe. Firſt, The demand left with the Defendant ought to have been produced. There is no reaſon why the general rule, that a copy cannot be read without notice to produce the original having been given, ſhould not apply to this caſe. If a letter be written, and the party writing it enter a copy in his letter-book and ſign it, would it not be neceſſary to give notice to produce the original before the duplicate could be admitted

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(*a*) That ſection enacts, "that no action "ſhall be brought againſt any conſtable, "headborough, or other officer, or againſt "any perſon or perſons acting by his order "and in his aid, for any thing done in "obedience to any warrant under the hand "or ſeal of any Juſtice of the Peace, until "demand hath been made or left at the "uſual place of his abode by the party or "parties intending to bring ſuch action, "or by his, her, or their attorney or agent "in writing, ſigned by the party demanding the ſame, of the peruſal and copy of "ſuch warrant, and the ſame hath been "refuſed or neglected for the ſpace of ſix "days after ſuch demand."

1799.
JORY
v.
ORCHARD.

mitted in evidence? A party can prove nothing by a copy where it would be neceſſary after producing the original to go one ſtep further, in order to eſtabliſh its validity. Now, in the preſent caſe, the act not only requires that a demand in writing ſhould be made, but alſo that it ſhould be ſigned, and if the demand left with the Defendant had been produced, the ſignature muſt have been proved (*a*). Secondly, The demand ought to have been ſigned by the Plaintiff himſelf, and not by his attorney. This point indeed was not raiſed at the trial, but it is competent to me to inſiſt upon it, ſince it would afford a ſufficient anſwer to the action in caſe of a new trial being granted. The ground of the objection is, that the word "party" appears never to have been uſed in the act to ſignify any perſon except the Plaintiff in the cauſe. Having therefore obtained that peculiar meaning, it muſt be ſo underſtood in this inſtance.

The Court intimated an opinion, that the latter objection was unfounded.

Lens Serjt. in ſupport of the rule. The queſtion is, whether the paper produced were in fact a copy, or whether it were not as much an original as that delivered to the Defendant. The analogy to be drawn from the caſe of a man writing two letters preciſely to the ſame effect, ſigning both, and ſending one to his correſpondent, and retaining the other, is in favour of the Plaintiff, for I contend, that the letter ſo retained would be of equal validity with that which was ſent. Here two originals were created, one of which was delivered to the Defendant, and the other was kept for the purpoſe of being made evidence. It is like the caſe of a notice to quit, where a duplicate is always admitted as evidence.

Lord ELDON Ch. J. With reſpect to the only queſtion which aroſe at *niſi prius*, namely, whether this paper is to be conſidered as a copy of the original notice, or as a duplicate original, the ſtrong inclination of my opinion is, that it is a duplicate original which, under the circumſtances of the caſe, afforded evidence

enough

(*a*) This diſtinction ſeems authoriſed by *R.* v. *Smith*, 1 *Str.* 126. more fully reported *Vin. Abr.* tit. Evidence, A. b. 26. pl. 68. where on a motion, that a Juſtice of Peace might produce on a trial of an indictment for ſubornation of perjury, an examination taken before him from a woman, who had been convicted of perjury, the Court after conſideration made the order, ſaying "a "copy of the examination is no evidence, "becauſe it deprives the party of contro-"verting whether it were his hand ſub-"ſcribed to it or not, and therefore the "original ought to be ſhewn, and ſo it is "in all caſes where written evidence is pro-"duced which is grounded on being under "a man's hand." See alſo *Hoe* v. *Nathorp*, 1 *Ld. Raym.* 154.

1799.

Jory v. Orchard.

enough for the Plaintiff to inſiſt that the trial ſhould proceed. I have looked into the act of parliament with a view to diſcover a ground on which any diſtinction may be founded between the notice required by the firſt ſection, to be given to Juſtices of the Peace previous to the commencement of an action againſt them, and the demand required by the ſixth ſection; but without ſucceſs. Unleſs I am miſtaken, it is the uſual courſe in actions againſt Juſtices of the Peace to produce a duplicate original; and the ſame thing is done with reſpect to notices to quit. It is true, that a notice to a Juſtice of the Peace need not be ſigned either by the Plaintiff or his attorney; though on the back of it the name and place of abode of the attorney muſt be indorſed; but it muſt have certain ſpecified contents, and the production of a copy, or duplicate of that notice therefore is not the very beſt evidence to prove that the notice had the contents ſpecified in the act. So a duplicate of a notice to quit is not the very beſt evidence of the contents of the notice delivered; for in that caſe alſo the contents may be proved to a certainty by the production of the notice itſelf, and the ſuppoſed duplicate original may be inaccurate. I do not ſee on what ground the diſtinction between thoſe caſes and this can be ſupported, the Plaintiff having ſhewn, that the paper produced was ſigned in the manner required by the act. The practice of allowing duplicates of this kind to be given in evidence, ſeems to be ſanctioned by this principle, that the original delivered being in the hands of the Defendant, it is in his power to contradict the duplicate original, by producing the other if they vary. We cannot hold the paper produced in this caſe to be inſufficient, without overturning the practice in actions againſt magiſtrates, and in caſes of notices to quit, unleſs I miſtake as to what that practice is—conceiving it to be as I have ſtated, I think this nonſuit cannot be ſupported.

Buller J. I am confident that this queſtion has often ariſen and been decided at *niſi prius*. But points of this kind paſs unnoticed unleſs afterwards moved in Court. The attorney in this caſe made two copies of the paper, one of which he meant to deliver; he ſigned both, and it was indifferent which of them he delivered, for they were both originals. It appears clearly from the report that the nonſuit was directed on the ground of the paper produced in evidence being a copy; but I think it clear, that both the papers were originals. With reſpect to the ſecond point, I agree with my Brother *Bayley*, that if any thing appear upon the report which would be the cauſe of a nonſuit at the ſecond trial,

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1799.
Jory v. Orchard.

the Court will take it into conſideration, though not expreſsly reſerved. But the ſtatute in queſtion not being a penal act, the Court are not bound to conſtrue it ſtrictly. I think, therefore, the demand being ſigned by the Plaintiff's attorney for him, is within the meaning of the ſtatute, a demand ſigned by the Plaintiff.

Heath J. I am of the ſame opinion. In principle I cannot diſtinguiſh this caſe from that of a duplicate notice to quit, which is received in evidence.

Rooke J. I confeſs, that I cannot make up my mind to agree with my Lord Chief Juſtice and my Brothers. The act requires this demand to be ſigned. In the other caſes which have been mentioned, both the notice delivered, and the duplicate retained, may be conſidered as originals. But here ſomething more is to be done beyond the mere production of the paper; the ſignature is to be proved; and how that is to be proved, by ſhewing that another paper was ſigned by the party, I do not perceive. I think that the Plaintiff ſhould have given notice to produce the original demand before he could entitle himſelf to give the counterpart in evidence.

Rule abſolute.

Nov. 18th.

HOLIN *v.* BARGUS.

In this Court notice of declaration is not neceſſary in bailable actions.

THE Plaintiff in this caſe having ſued out a bailable writ, filed a declaration *de bene eſſe*, and gave a rule to plead; on the evening of the day on which bail were perfected (the Rule to plead being then expired) he ſerved the Defendant with a demand of a plea, and on the next day ſigned judgment. *Williams* Serjt. having obtained a Rule *niſi* for ſetting aſide this judgment on the ground of a notice of declaration being neceſſary in this as well as in an action not bailable, and that any diſtinction between the two in this reſpect was not well founded; *Cockell* Serjt. ſhewed cauſe, and relied on *Simmons* v. *Shannon*, 3 *Wilſ.* 147. 2 *Bl.* 725. S. C. and *Shuttleworth* v. *Feilder* (*a*), *Hil.* 37 *Geo.* 3. C. B. where the diſtinction between actions bailable and not bailable with reſpect to giving notice of declaration, was recognized.

Williams contrà obſerved, that the two reports of *Simmons* v. *Shannon*, in *Wilſon* and *Blackſtone* varied materially from each other;

(*a*) This caſe was cited from a manuſcript note in the margin of *Impey's Pr.* *C. B.* p. 234. *ed.* 4. made by one of the officers of the Court.

1799.
HOLIN
v.
BARGUS.

other; that in the former of theſe books, a difference of opinion was ſtated to have exiſted among the prothonotaries and ſecondaries upon this point, and that the Court there intimated an intention of making a Rule to ſettle it. He alſo alluded to the practice of the *King's Bench*, where notice is equally required in either caſe (*a*).

The Court agreed, that the practice of the *King's Bench* was the moſt conſiſtent, but thinking the point ſettled in this Court refuſed to ſet aſide the judgment unleſs on payment of coſts.

(*a*) See *Reg. T.* 2 *Geo.* 2. B. R. alſo 1 *Sellon Pr.* 234. *ed.* 2.

JOHN and CHARLES CARTWRIGHT *v.* AMATT and Another.

Nov. 18th.

A. by indenture (reciting that a ſuit was depending between him and *B.* reſpecting certain patents, and that the ſame could not be aſſigned without hazard of defeating the ſuit) granted abſolutely the ſaid patents together with ſome others to *C.*, excepting however until the determination of the above mentioned ſuit, ſuch patents as ſhould be neceſſary to ſupport *A.*'s legal title. Then followed a covenant that *A.* upon the determination of the ſuit, ſhould aſſign the excepted patents to *C.* and that until ſuch aſſignment, *A.* ſhould ſtand legally poſſeſſed of the ſame. Held, that the legal intereſt in the excepted patents veſted in *C.* upon the determination of the ſuit, without aſſignment.

THIS was an action on the caſe for the infringement of a patent. The declaration, after ſtating the grant of the letters patent to one *Edmund Cartwright*, the inrollment of the ſpecification, &c. proceeded to aver, that " the ſaid *Edmund Cartwright* afterwards and before the committing the ſeveral grievances hereinafter-mentioned, *to wit* on, &c. at, &c. by a certain indenture then and there made between the ſaid *Edmund Cartwright* of the firſt part, the the Plaintiffs of the ſecond part, and certain other perſons therein reſpectively mentioned and referred to, of the third and fourth parts (one part of which, &c.) did for the conſiderations therein mentioned, grant, bargain, ſell, aſſign, transfer, and ſet over unto the Plaintiffs, their executors, &c. the beforementioned letters patent, &c. ſaving, excepting, and reſerving unto the ſaid *Edmund Cartwright*, his executors and adminiſtrators, until the final determination or concluſion of a certain ſuit in the ſaid indenture mentioned then depending, *and now long ſince ended and concluded*, ſuch of the ſaid letters patent in the ſaid indenture mentioned, as ſhould be neceſſary to be given in evidence for the ſupport of the ſaid ſuit, and the legal right and intereſt of the ſaid *Edmund Cartwright* in and to the ſame to hold," &c.

The cauſe came on to be tried before *Rooke* J. at the *Guildhall* ſittings, after laſt *Trinity* Term, when the deed of aſſignment being produced in evidence, it appeared from the recital, that as there was a ſuit depending between *Edmund Cartwright* Plaintiff, and

1799.

Cart-wright *v.* Amatt.

William Toplis Defendant, reſpecting an infringement of certain letters patent, and until ſuch ſuit had been legally tried, the legal right or property of the ſaid *Edmund Cartwright*, in ſuch letters patent as related to the inventions of combing wool and ſimilar articles (which were the letters patent in queſtion) could not, it was apprehended, be fully aſſigned or made over by him to the Plaintiffs without hazard of defeating the ſaid ſuit, it was agreed, that in the mean time, and until ſuch ſuit was determined, *Edmund Cartwright* ſhould continue legal owner of the patents, in truſt for the Plaintiffs, in whoſe cuſtody they were to remain, and who were to have all the benefits ariſing from them: Then followed an abſolute grant of the letters patent in queſtion, together with others, to the Plaintiffs with the following exception "ſave and except nevertheleſs, and out of theſe preſents reſerving unto the ſaid *Edmund Cartwright* until the final determination or concluſion of the ſuit or action now depending between him the ſaid *Edmund Cartwright* and the ſaid *William Toplis*, all ſuch of the ſaid herein beforementioned patents as are or ſhall be neceſſary to be given in evidence for the ſupport of the ſaid ſuit or action, and the legal right or intereſt of the ſaid *Edmund Cartwright* in and to the ſame, upon the truſts," *&c.* After the truſts was inſerted this covenant for further and better aſſigning the letters patent "that when and ſo ſoon as the ſaid ſuit or action now depending between the ſaid *Edmund Cartwright* and the ſaid *William Toplis* ſhall have been finally determined, he the ſaid *Edmund Cartwright* ſhall forthwith thereafter well and effectually grant, aſſign, and make over to the Plaintiffs upon the truſts, *&c.* the ſaid herein before excepted grants or letters patent, touching or relating to the ſaid inventions, and every or any other matters, in conteſt for which the ſame were reſerved out of theſe preſents, and the ſpecifications thereof *and all his legal and other eſtate and intereſt therein; and that in the mean time and until ſuch laſt-mentioned aſſignment thereof, ſhall be made and executed, he the ſaid* Edmund Cartwright *ſhall and will ſtand legally poſſeſſed of, and intereſted in the ſame reſerved grants or letters patent for the behoof of them the Plaintiffs, their executors*, &c. *ſubject to the ſame truſts*," *&c.* It was objected on the part of the Defendants, that as no aſſignment had taken place ſubſequent to the determination of the depending ſuit, the legal intereſt, not being veſted in the Plaintiffs by the deed produced, ſtill remained in *Edmund Cartwright*, and therefore the Plaintiffs could not recover. The learned judge being of that opinion, directed a nonſuit.

Runnington Serjt. on a former day moved to ſet aſide this nonſuit, and contended, that it was the manifeſt intention of the parties that the whole legal intereſt ſhould paſs to the Plaintiffs as ſoon as the ſuit, which was depending, ſhould be determined, and that the laſt covenant, which was only inſerted *pro majori cautelâ* ought not to be allowed to defeat that intention; a rule *niſi* was accordingly granted.

On this day *Shepherd* and *Lens* Serjts. were to have ſhewn cauſe againſt that rule;

But *Rooke* J. ſaid, That on a further conſideration of the effect of the deed than was given to it at *niſi prius*, he was convinced that the legal intereſt veſted in the Plaintiffs immediately on the determination of the ſuit that was depending at the time when the indenture was executed.

And the reſt of *the Court* having expreſſed themſelves clearly of the ſame opinion,

The rule was made abſolute without argument.

DONNELLY *v.* DUNN.

Nov. 19th.

Bail cannot plead the bankruptcy and certificate of their principal in their own diſcharge.

THIS was an action of debt on a recognizance of bail. The Defendant pleaded the bankruptcy of his principal circumſtantially (*a*); to which there was a general demurrer and joinder.

Bayley Serjt. in ſupport of the demurrer. Admitting this plea to be well pleaded, I contend that it is not competent to the bail to plead the bankruptcy of their principal. By the 5 *Geo.* 2. *c.* 30. *ſ.* 7. the plea of bankruptcy is put into the mouth of the bankrupt only, and the bail, if entitled to any relief, muſt obtain it by application to the ſummary juriſdiction of the Court. The Legiſlature has provided for all the difficulties to which the bankrupt may be ſubject; if he be arreſted, he ſhall be diſcharged on common appearance, *ſ.* 7.; if obliged to plead, the general plea is given him; if under the neceſſity of ſupporting that plea by evidence,

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(*a*) He had before pleaded it more generally, and obtained leave to amend; *vide ante* vol. 1. p. 448. There was another action brought by *Donelly* againſt *Maclagan*, the other bail, under circumſtances preciſely ſimilar to *Donelly* v. *Dunn*, which came on at the ſame time, and on which the ſame judgment was given.

evidence, the 41ſt ſection of the act is in his aid; and if taken or detained in execution, he ſhall be diſcharged on ſummary application, *ſ.* 13.; but there are no proviſions in favour of the bail. The mode in which they have uſually been relieved may be collected from ſome caſes on the ſubject. In *Ray and Others* v. *Huſſey*, *E.* 24 *Geo.* 2. *Barnes* 104. the Defendant having become bankrupt pending the action, an *exoneretur* was entered on the recognizance: and in a note to that caſe, it is obſerved, that it was a new practice introduced to diſcharge the bail in a ſummary way, without putting them to the trouble and charge of ſurrendering the principal as formerly. This ſhews the contemporaneous opinion of the profeſſion reſpecting the act of *Geo.* 2. for if the Defendant could have pleaded the bankruptcy, the Court would not have interfered. A ſimilar account of the practice is given by Lord *Mansfield* in *Martin* v. *O'Hara*, *Cowp.* 824; and by *Buller* J. in *Southcote* v. *Braithwaite*, 1 *Term Rep.* 624. Indeed, it was ſtrongly intimated by this Court on a late occaſion, that the bail could not in any caſe plead the bankruptcy of their principal. *Donnelly* v. *Dunn*, *ante*, vol. 1. 448. and *Beddome* v. *Holbrooke*, *ibid. in notis.* This is a new experiment, and if allowed to ſucceed, might in many caſes be highly prejudicial to juſtice.

Marſhall Serjt. *contrà.* I do not mean to controvert the authorities by which it is eſtabliſhed, that the Court has power to diſcharge the bail on a ſummary application where the principal has become bankrupt and obtained his certificate: but I contend, that if the bankruptcy and certificate be a legal diſcharge to the principal, it is a legal diſcharge to the bail; and if ſo, may be pleaded. Indeed, it is the only way of inveſtigating whether there be any fraud in the means by which the certificate was obtained; and ſo the Court ſeem to have thought in *Vincent* v. *Brady*, 2 *H. Bl.* 1. The plea merely ſtates that the bankrupt has got his certificate; and if the Plaintiffs meant to ſhew that it was obtained by fraud, they ſhould have replied it. From the terms of the recognizance, which are, "that the principal ſhall ſurrender himſelf or pay the debt," it is doubtful whether the bail can ſurrender him againſt his will. If then he will not ſurrender himſelf, ſhall not the bail be at liberty to pray him in aid?

LORD ELDON, Ch. J. It is not the intereſt of the bankrupt to refuſe to ſurrender himſelf in diſcharge of his bail. The execution of his creditors againſt him is barred by the certificate; but if he allow his bail to pay the debt, he thereby creates a new creditor for a debt to the ſame amount, which is not barred by the certificate. The plea of bankruptcy is given to the bankrupt to be made uſe of as the means of diſcharging himſelf, if he ſo pleaſe. But there may be many caſes in which the bankrupt may not chuſe to make uſe of his certificate. If he has been guilty of a fraud, he may be fearful of bringing it forward. If he has acquired an acceſſion of fortune ſubſequent to the obtaining of his certificate he may be aſhamed to plead it. Shall he then, through the medium of his bail, be obliged to make uſe of his certificate whether he will or not? It is the duty of the bail, under their recognizance, to render the bankrupt; and it remains with the bankrupt himſelf to determine whether any uſe ſhall be made of the certificate. Suppoſe the two bail to be creditors ſufficient in number and value to ſign the certificate; if they could plead it alſo, they would have it in their power to ſign their own diſcharge.

Buller, J. It is of importance to the public, and to the profeſſion, to put an end to attempts to introduce upon the record queſtions of practice which cannot be conſidered as legal defences, but which belong rather to what may be called the equity ſide of the Court. This action is brought for a legal demand ariſing upon a debt of record; and the Defendant is called upon to ſtate a legal defence upon record, not merely to ſay that he has equity in his favour. Now, what legal defence has he ſet up? He muſt either ſhew a legal impoſſibility to perform the condition of the recognizance, or ſtate ſomething that will diſcharge him. Has he done either? Certainly not. Then the Plaintiff remains unanſwered.

Heath, J. It does not follow that the bail are to have all the advantages to which their principal is entitled. Suppoſe in an action on a judgment there be manifeſt error on the record, the bail cannot avail themſelves of ſuch error, though the principal may.

Lord Eldon, Ch. J. added, We do not mean to preclude any application for ſummary relief on the part of the bail; but the opinion of the Court is, that on this record judgment muſt be given for the Plaintiff.

Judgment for the Plaintiff.

1799.

Nov. 21ſt.

Fowler *v.* Morton.

If an affidavit to hold to bail ſtate the circumſtances under which a debt accrued, and conclude "by reaſon whereof the Defendant ſtands indebted in ——*l.* which he hath refuſed and ſtill refuſes to pay," it is bad. If ſuch an affidavit negative a tender in "notes of the Bank of *England*, payable on demand," it is a ſufficient compliance with 37 *Geo.* 3. *c.* 45. *ſ.* 9. though the words of that act are "*expreſſed* to be payable on demand."

The Defendant in this caſe was held to bail upon an affidavit of the Plaintiff, ſtating that the Defendant on or about the 9th of *May* 1799 agreed with the Plaintiff, who was a common carrier, that if the Plaintiff would give up to him the buſineſs of a common carrier he would pay to the Plaintiff 4 *l.*, would take his cart at a valuation, and pay the amount of all the book-debts due to the Plaintiff up to the time of making the agreement: that the cart was valued at four guineas, of which the defendant had notice; that the book-debts amounted to 4 *l.* 9 *s.* 7 *d.* of which the Plaintiff informed the Defendant; that in purſuance and performance of the above agreement, the Plaintiff did give up the buſineſs to the defendant, who had ever ſince carried it on.—"By reaſon whereof the ſaid *Chriſtopher Morton* became indebted to him the deponent in the ſum of 12 *l.* 13 *s.* 7 *d.* out of which the deponent had received the ſum of 1 *l.* 1 *s.* only: and by reaſon thereof the ſaid *Chriſtopher Morton* now is, and ſtandeth juſtly and truly indebted to him the deponent in the ſum of 11 *l.* 12 *s.* 7 *d.* which he hath refuſed and ſtill doth refuſe to pay." The affidavit further ſtated that no offer had been made by the ſaid Defendant to pay the ſaid ſum of 11 *l.* 12 *s.* 7 *d.* (the debt ſworn to) "in notes of the Governor and Company of the Bank of *England*, *payable on demand.*

Lens. Serjt. on a former day moved for a rule to ſhew cauſe why the bail-bond ſhould not be cancelled on the defendant entering a common appearance. He ſtated two objections to the affidavit; firſt, that the debt was not ſworn to poſitively, on account of the words "by reaſon whereof:" ſecondly, that in the denial of a tender in Bank-notes the notes were not deſcribed in the words of the act of parliament (*a*) which are "*expreſſed* to be payable on demand."

The Court refuſed the rule upon the latter objection, but granted it upon the former:

Againſt which objection *Williams* Serjt. now contended, that although the plaintiff had ſtated more than was neceſſary, yet that the debt for which he held the Defendant to bail was ſworn to with certainty.

(*a*) 37 *Geo.* 3. *c.* 45. *ſ.* 9.

But *The Court* being of a contrary opinion made the rule abſolute (*a*).

Rule abſolute.

(*a*) *Vide Mackenzie* v. *Mackenzie*, 1 *Term Rep.* 716. and *Wheeler* v. *Copeland*, 5 *Term Rep.* 364.

WALLACE *v.* ARROWSMITH.

Nov. 21ſt.

If two of attorney's clerks be put in as bail, the Plaintiff may treat ſuch bail as a nullity and take an aſſignment of the bail-bond.

HEYWOOD Serjt. ſhewed for cauſe againſt a rule *niſi* for ſtaying proceedings on the bail-bond, that the bail put in were both clerks to the defendant's attorney, and being therefore within the rule of Court (*a*), the Plaintiff had a right to treat the bail as a nullity, and take an aſſignment of the bail-bond. He cited *Corniſh* v. *Roſs*, 2 *H. Bl.* 350.

Bayley Serjt. *contrà* inſiſted, that though the bail might have been rejected had they been brought up to juſtify, yet it was not competent to the Plaintiff to determine on their ſufficiency; and relied on *Thomſon* v. *Roubell*, *Doug.* 466. *in notis*, where it was ſo decided. *Heywood* then cited *Fenton* v. *Ruggles*, *ante*, vol. 1. 356. where the Court, in a ſimilar caſe to this, held that the plaintiff might take an aſſignment of the bail-bond:

And *The Court* recognizing that caſe

Diſcharged the rule with coſts.

(*a*) *Reg. M.* 6 *Geo.* 2. alſo *Laing* v. *Cundale*, 1 *H. Bl.* 76.

SPICER *v.* TEASDALE.

Nov. 23d.

If a Plaintiff obtain judgment upon one of ſeveral counts in a declaration, he is entitled to the coſts of the whole. And if after entering up judgment for himſelf upon two counts he diſcover an error in one of them, he may wave his judgment on that count and enter it for the Defendant.

THE Plaintiff in this caſe declared upon a bill of exchange; the declaration contained three counts; to the two firſt the Defendant demurred, but judgment was given for the Plaintiff, who then entered a *nolle proſequi* as to the third; coſts having been allowed to the plaintiff upon all three counts, he entered up judgment for himſelf upon the two firſt; but afterwards finding a miſtake in the ſecond count, he altered the judgment by entering it for the Defendant upon that count.

The bail being ſued, *Shepherd* Serjt. on a former day moved to ſet aſide the judgment on two grounds; firſt, becauſe the Plaintiff was not entitled to coſts upon the two laſt counts of the declaration; and ſecondly, becauſe after entering up judgment for himſelf on the ſecond count he had no authority to alter it.

1799.

SPICER *v.* TEASDALE.

Cockell Serjt. now ſhewed cauſe, and contended that by the practice of the *Common Pleas*, if the Plaintiff obtain judgment upon one count, he is entitled to the coſts of the whole declaration (*a*); and that in the preſent caſe the Plaintiff, on diſcovering his miſtake, had a right to wave his judgment on the ſecond count and enter it for the Defendant.

The Court were of opinion that the Plaintiff had a right to wave his judgment on the ſecond count, and that the bail ought not to be allowed to hold him to it, againſt his inclination; and agreed, with reſpect to the coſts, that the practice of this Court had been correctly ſtated on the part of the Plaintiff. But *Buller* J. added, that the practice of the *King's Bench* was different, and indeed more reaſonable; for there, if judgment be given on demurrer for the Plaintiff on ſome counts, and for the Defendant on the others, the Plaintiff is entitled to coſts on thoſe counts only on which he has judgment, though coſts are not allowed to the Defendant on the others (*b*); and that an intention had been intimated

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(*a*) This was ſettled after much diſcuſſion in *Brydges* v. *Raymond*, 2 *Bl.* 800; and in *Norris* v. *Waldron*, 2 *Bl.* 1199. the ſame rule was allowed to prevail, though the counts were for different cauſes of action. However it is ſtated by *LeBlanc* Serjt. 8 *Term Rep.* 467. that in *Tr.* 32 *Geo.* 3. the court of *Common Pleas* held, that a defendant who had ſuffered judgment by default as to part of a declaration in covenant, conſiſting of one count only, and pleaded to the reſidue, upon which iſſue was joined and found for him, was entitled to the coſts of that iſſue.

(*b*) *Henderſon* v. *Rumbold*, *Hil.* 4 *Geo.* 3. *K. B. Sayer's Coſts*, 212. And this rule holds in *B. R.* where the Defendant pleads ſeparately to different counts; as if he demur to the firſt count, and go to iſſue on the ſecond; *Aſtley* v. *Young*, 2 *Burr.* 1232. or plead not guilty to the firſt, and a juſtification to the ſecond, *Butcher* v. *Green*, *Doug.* 678. But where there are ſeparate cauſes of action laid in ſeparate counts, and the Plaintiff ſucceeds on ſome and the Defendant on others, as ſeparate judgments muſt be given, each party is entitled to the coſts of ſo much as he ſucceeds in. *Day* v. *Hanks*, 3 *Term Rep.* 654. In *Tempeſt* v. *Metcalf*, 1 *Wilſ.* 331. a verdict having been found for the Defendant on the moſt material of there feigned iſſues, and for the Plaintiff on the other two, it was moved that the Plaintiff ſhould have *no* coſts; but the Court ſaid, that if any one iſſue be found for the Plaintiff he ſhould have *his* coſts. By which ſeems to have been meant that the Plaintiff ſhould have coſts on the iſſues found for him, and the Defendant on the iſſue found for him. See alſo *Braithwaite* v. *Bradford*, 6 *Term Rep.* 599.; though that caſe was partly decided on the conſtruction of a particular ſtatute. So if the Defendant plead a juſtification to a declaration conſiſting of one count only, and the Plaintiff traverſe the juſtification, and alſo new aſſigns; if the Defendant ſuffer judgment by default on the new aſſignment, but obtain a verdict on the traverſe, he is entitled to the coſts of the iſſue on which he ſucceeds. *Griffiths* v. *Davies*, 8 *Term Rep.* 466. With reſpect to *Butcher* v. *Green*, it may be obſerved, that the two counts contained ſeparate cauſes of action, one being in trover, and the other for words; but the caſe was treated as if it had been otherwiſe. Indeed it has been holden, that where a Defendant pleads two pleas under the ſtatute, to the whole declaration, upon one of which judgment is given for him on demurrer, and upon the other a verdict is found againſt him, he ſhall be allowed coſts on the former, but the plaintiff ſhall not be allowed coſts on the latter, ſince upon the whole he has no cauſe of action. *Cooke* v. *Sayer*, 2 *Burr.*

Spicer *v.* Teasdale.

mated in this Court of altering the practice, though he believed it had never been done.

Rule diſcharged.

Burr. 753. But it has ſince been expreſsly laid down, that if one of ſeveral pleas pleaded under the ſtatute be held bad on demurrer, and a verdict be given for the Defendant on the others, the Plaintiff by the words of the 4 *Anne*, c. 16. ſ. 5. is entitled to the coſts of the bad plea, though upon the whole record he appear to have no cauſe of action. *Duberly* v. *Page*, 2 *Term Rep.* 391. So, if the Plaintiff in replevin plead ſeveral pleas in bar under the ſtatute, upon which ſeveral iſſues are taken, the avowant is entitled to the coſts of the iſſues found for him. *Dodd* v. *Joddrel*, 2 *Term Rep.* 235. On both theſe latter points ariſing out of the conſtruction of the ſtatute of *Anne*, the practice of the *Common Pleas* agrees with that of the *King's Bench*. *Greenhow* v. *Ilſley* and others, *Barnes*, 136, and *Brooke* v. *Willet*, 2 *H. Bl.* 435. In *Greenhow* v. *Ilſley*, it was debated among the Judges, and held to make no difference that the demurrer on which judgment was given for the Plaintiff (who was nonſuited in the general iſſue) was to a plea in bar pleaded by the defendant to a new aſſignment, which the Plaintiff had pleaded to one of ſeveral pleas under the ſtatute; and in *Brooke* v. *Willet*, the coſts given by the ſtatute were held to extend to the trial of the iſſues as well as the pleadings. In the *King's Bench*, however, if the Defendant obtain a verdict upon one of ſeveral pleas pleaded under the ſtatute, and that plea prove to be bad, in conſequence of which the Plaintiff having ſucceeded on the other pleas, is permitted to enter up judgment, the latter is allowed coſts on the pleas found for him, and neither he or the defendant on the bad plea; *Kirk* v. *Nowell*, 1 *Term Rep.* 118. 266. in which caſe the reaſon given for not allowing coſts to the Plaintiff on the bad plea alſo, was, that "he ſhould have demurred to it." Indeed in ſuch a caſe the proviſions of the ſtatute of *Anne*, which only entitle a Plaintiff to the coſts of one of ſeveral pleas found for him on *verdict* or *demurrer* do not apply; and therefore it falls within the principle of thoſe caſes which have been decided independent of the ſtatute.

WHALEY *v.* PAJOT.

Nov. 25th.

ASSUMPSIT on a wager.

The cauſe was tried before *Heath* J. at the *Guildhall* ſittings after laſt *Trinity Term*, when the following agreement between the parties was proved: "Mr. *Pajot* bets Mr. *William Whaley* five hundred guineas and a dinner (to be had at *Sittingbourne*, in *Kent*) that his Mr. *Pajot's* brown horſe, called *Little Devil*, goes from *London* to the ſaid town in the ſaid county of *Kent* (rode alſo by himſelf) ſooner than Mr. *William Whaley's* two hacks, one a brown called *Billy*, the other a dark bay called *Allſteel*, go the ſame diſtance; the two horſes of Mr. *W. Whaley* to be placed at any diſtance from each other that he Mr. *W. Whaley* may think proper, but to be obliged, one of them, to arrive in the

No action will lie on a wager though above 50 *l.* that a ſingle horſe ſhall run on the high road from *A* to *B.* and arrive ſooner than one of two horſes placed at any diſtance the owner ſhall pleaſe; ſuch a race not being legalized by 13 *Geo.* 2. c. 19. and 18 *Geo.* 2. c. 34. ſ. 11. If on an agreement of this kind be indorſed "*N. B.* To ſtart P. P. in fifteen days from this date," and no notice be taken of ſuch indorſement in the declaration, and no evidence be given to explain the meaning of the letters "P. P." the Court will not, after verdict, hold it to be a variance.

town of *Sittingbourne* ſooner than Mr. *Pajot*'s horſe. Mr. *W. Whaley* has the power of naming his rider. The meaning of this bet is, that Mr. *Pajot* bets Mr. *W. Whaley* that his Mr. *Pajot*'s horſe can go the diſtance above mentioned in a ſhorter time than Mr. *W. Whaley*'s horſes above mentioned, placing one of them at a certain diſtance from the place from whence the other ſtarts.

(Signed) W. WHALEY,
PAJOT."

On this agreement, which was ſet out in the declaration, was the following indorſement: "*N. B.* To ſtart P. P. in fifteen days from this date." Of this indorſement no notice was taken in the declaration, nor was any evidence given at the trial to explain the meaning of the letters "P. P." The race was won by the Plaintiff's horſes, and the Jury found a verdict in his favour.

A rule *niſi* having been moved for on a former day, either to ſet aſide this verdict, and enter a nonſuit, on the ground of a variance between the declaration and the agreement, becauſe no notice was taken in the former of the indorſement, or to arreſt the judgment on the ground of the wager being illegal, *The Court* granted a rule to ſhew cauſe in the latter ſhape only, ſaying, with reſpect to the former, that it was not neceſſary to ſtate the indorſement, inaſmuch as the letters "P. P." were merely inſenſible letters.

Cockell and *Shepherd* Serjts. ſhewed cauſe, and relied on the 13th of *Geo.* 2. *c.* 19. and 18 *Geo.* 2. *c.* 34. *ſ.* 11., by the former of which acts they obſerved that matches for 50 *l.* and upwards were legalized, provided they were run at certain places, and the horſes carried certain weights, and that by the latter act the reſtrictions as to running at particular places and with certain weights were taken away.

Runnington and *Lens* Serjts. *contrà*. Under the 16 *Car.* 2. *c.* 19. and 9 *Anne*, *c.* 14. it is very clear that this wager would be void; unleſs therefore it appear to be expreſsly legalized by 13 *Geo.* 2. and 18 *Geo.* 2. the Court cannot ſupport it. The preambles of the two latter ſtatutes ſhew that they were paſſed in order to prevent the exceſſive increaſe of horſe-racing, and all the proviſions are calculated to effect that purpoſe. The regulations introduced into the 13 *Geo.* 2 reſpecting *entering and ſtarting*, *&c.* clearly prove that the horſe-racing legalized by that act muſt be confined to horſe-racing carried on in the uſual manner. It is not enough that the wager depend on the ſpeed of horſes, unleſs that ſpeed be exerciſed in the acuſtomed manner. In *Bidmead* v. *Gale*, 4 *Bur.* 2432. the race upon which the Plaintiff recovered was of the ordinary kind. The expreſſion "any place or places whatſoever," employed in 18 *Geo.* 2. *c.* 34. *ſ.* 11. muſt for the ſame reaſon be reſtrained to thoſe places where races are uſually run; and indeed it would be dangerous to public ſafety to allow matches to be run upon the king's high-way. Even upon the letter of the eleventh (*a*) ſection, it may be contended that the penalties of the former act are only taken away as far as relates to the regulation reſpecting weights. In *Ximenes* v. *Jacques*, 6 *Term Rep.* 499. where the Plaintiff obtained a verdict on a wager that he could perform a certain journey in a poſt-chaiſe and pair, within a given time, the Court arreſted the judgment: and though the reaſons for their ſo doing are not ſtated in the report of that caſe, yet it may be preſumed, that as the race was not of the uſual kind, the Court did not conſider it legalized by the acts on which theſe Plaintiffs now rely.

Cur. adv. vult.

On a ſubſequent day,

Lord Eldon Ch. J. ſaid, The Court wiſhes to have this caſe argued again on that point, which ſeemed to come rather by ſurpriſe upon the Plaintiff's counſel, namely, whether this tranſaction, which is called a horſe-race, be a match or race, within the meaning of the 13 & 18 *Geo.* 2. It is the more material that this queſtion ſhould be again diſcuſſed, becauſe it does not appear from the report of *Ximenes* v. *Jacques* to have been there conſidered; and yet a race with a poſt-chaiſe and pair is hardly to be deemed leſs a race, in the popular ſenſe of the word, than ſuch a race as the preſent one on the high-road from *London* to *Sittingbourne*. The 16 *Car.* 2. *c.* 7. in the ſecond ſection, prohibited various ſpecies of gaming, horſe-racing, foot-racing, &c. under certain penalties. After this the 9 *Anne*, *c.* 14. alſo prohibited various ſpecies of gaming under heavier penalties, and though horſe-racing was not named in that ſtatute, yet it has been holden to come within the ſpirit of it (*b*). The 16 *Car.* 2. does not in terms avoid

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(*a*) The ſection is, "that it ſhall and may be lawful for any perſon to run any match, or to ſtart and run for any plate, prize, ſum of money, or other thing of the real intrinſic value of 50*l.* or upwards, at any weights whatſoever, and at any place or places whatſoever without incurring or being liable to the penalty or penalties in the ſaid act of the 13th of his Majeſty's reign *relating to weights as aforementioned*, and in the ſame manner as might have been done if the ſaid act had never been made."

(*b*) Vid. *Goodburn* v. *Morley*, 2 *Str.* 1159. *Blaxton* v. *Pye*, 2 *Wilſ.* 309. and *Clayton* v. *Jennings*, 2 *Bl.* 706. So alſo a foot-race; *Lynall* v. *Longbotham*, 2 *Wilſ.* 36. and *Brown* v. *Berkeley*, *Cowp.* 281.

1799.
WHALEY v. PAJOT.

any contract; but the tranſaction on which the contract is founded being prohibited, the contract itſelf cannot be ſupported. The 9 *Anne*, expreſsly avoids the contract. Theſe ſtatutes were followed by the 13 *Geo.* 2. *c.* 19. & 19 *Geo.* 2. *c.* 34. Had many contracts founded in horſe-racing been held illegal previous to theſe ſtatutes, it might be found difficult to maintain that ſuch horſe-racing could now be deemed legal, which before had been deemed illegal. But the 13 *Geo.* 2. having prohibited many ſpecies of horſe-racing, the law ſeems to have implied that ſuch ſpecies of horſe-racing as were not prohibited by that ſtatute, by not being prohibited became legal. And the 18 *Geo.* 2. having taken away ſome of the prohibitions and penalties of the 13 *Geo.* 2. the ſame kind of reaſoning ſeems to have been applied, namely, that theſe ſpecies of racing with reſpect to which certain reſtrictions were taken away, were thereby altogether legalized. There ſeems to be much ground for arguing from the nature of the 16 *Car.* 2. & 9 *Anne*, that theſe acts ought to be conſtrued ſtrictly in order to enforce the principle on which they are founded, namely, to prohibit all horſe-racing; and that the 13 & 18 *Geo.* 2. are from their nature to be ſo conſtrued as to encourage the breed of horſes, and to permit that ſpecies of horſe-racing only, called racing on the turf. It is to be obſerved, that the 13 *Geo.* 2. ſpeaks of entering, placing, ſtarting, &c. and that the expreſſion "any place or places whatſoever," uſed in 18 *Geo.* 2. can hardly mean all *England*.

In conſequence of this intimation from *the Court*, the caſe ſtood over for further argument; but on this day,

LORD ELDON Ch. J. ſaid, Upon inquiry of the Judges of the Court of *King's Bench*, we find that the judgment of that Court in *Ximenes* v. *Jacques* proceeded on an opinion, that the 13 & 18 *Geo.* 2. relate to *bonâ fide* horſe-racing only. Without therefore again entering into the grounds before ſtated, it is ſufficient for me to declare it to be the opinion of the Court, that the tranſaction deſcribed in this caſe, is not that ſpecies of horſe-race or match which is legalized by the 13 & 18 *Geo.* 2. and conſequently that this action cannot be maintained.

Per Curiam, Rule abſolute.

DOE ex dim. BADDAM *v.* ROE.

Nov. 27th.

Service of a declaration in ejectment on the wife of the tenant in poſſeſſion at his houſe, is ſufficient.

HEYWOOD Serjt. ſtated, that the officers objected to draw up a rule for judgment againſt the caſual ejector on an affidavit of ſervice, which alleged, that the declaration in ejectment was ſerved at the dwelling-houſe of the tenant in poſſeſſion on the tenant's wife. He cited *Doe* d. *Morland* v. *Bayliſs*, 6 *Term Rep.* 765. to ſhew that the ſervice was ſufficient (*a*).

The Court were of opinion, that the ſervice was ſufficient.

(*a*) Vid. etiam *Goodright ex dem. Waddington* v. *Thruſtout*, 2 *Bl.* 800. *Smith ex dim. Lord Stourton and Others* v. *Hunt*, 1 *H. Bl.* 644. and what was ſaid by *Eyre* Ch. J. in *Goodtitle ex dim. Read* v. *Badtitle*, *ante*, vol. 1. 384.

GOLDSMID and Others *v.* TAITE and Another.

Nov. 28th.

The Court will refer a bill of exchange to the prothonotary to compute principal, intereſt, *exchange*, *re-exchange*, and coſts; but not *charges and expences*.

SHEPHERD Serjt. on a former day obtained a rule to ſhew cauſe why a bill of exchange ſhould not be referred to the prothonotary to compute principal, intereſt, exchange, re-exchange, charges, expences and coſts, or why a writ of inquiry ſhould not be executed before the Lord Chief Juſtice and a ſpecial jury.

Heywood Serjt. now ſhewed cauſe and contended, that exchange and re-exchange were damages of a ſpecial nature, and ought to be aſcertained by a jury, but that the Defendants ought not to be put to the expence of a ſpecial jury ſince a common jury was quite competent to aſcertain the amount. He inſiſted, that it was altogether out of the province of the prothonotary to take account of charges and expences, ſince they could not be matter of mere computation.

Shepherd offered to ſtrike out the words "charges and expences," but inſiſted, that unleſs the Defendants could ſhew that the computation of exchange and re-exchange was of ſufficient conſequence to require a ſpecial jury, he ought to allow it to be ſettled by the prothonotary. And

The Court being of this opinion, made the rule abſolute for referring the bill to the prothonotary to compute principal, intereſt, exchange, re-exchange, and coſts.

1799.

Nov. 28th.

In *C. B.* if the Plaintiff proceed to trial after money paid into Court, and the verdiſt is againſt him, he is notwithſtanding entitled to coſts up to the time of the money paid in.

Wilton *v.* Place.

The Plaintiff having commenced actions againſt ſeveral underwriters on a policy of inſurance, the Defendant in all the actions paid money into Court upon the common counts. One cauſe was tried and a verdict found for the Defendant. No conſolidation rule had actually been entered into, but it appearing to have been the underſtanding of the parties that all the cauſes ſhould be bound by the event of one, the Court at the inſtance of *Shepherd* Serjt. were about to direct the prothonotary to tax coſts to the Defendant in all the cauſes, as well up to the time of paying the money into Court as afterwards, according to the rule laid down in *Stevenſon* v. *Yorke*, 4 *Term Rep.* 10. *Kabell* v. *Hudſon*, *ibid.* and *Burſtall* v. *Horner*, 7 *Term Rep.* 372. (*a*)

Heywood Serjt. oppoſed this, and the prothonotary ſtated, that according to the practice of the *Common Pleas*, where money is paid into Court though the Defendant ultimately ſucceed in the cauſe when tried, yet the Plaintiff is entitled to coſts till the time of the money being paid into Court.

Upon hearing this, *the Court* obſerved, that the practice as ſtated by the prothonotary (*b*) muſt prevail.

(*a*) So in *Stodhart* v. *Johnſon*, 3 *T. R.* 657. where the Plaintiff proceeded to trial and a juror was withdrawn, he was held not to be entitled to coſts up to the time of paying the money into Court. But in *Seymour* v. *Bridge*, 8 *Term Rep.* 408. where the Plaintiff having given notice of trial, neither entered his cauſe, or countermanded the notice, but took the money out of Court, he was allowed coſts up to the time of the money being paid in, though the Defendant was entitled to judgment as in caſe of a nonſuit. And in *Lorck* v. *Wright*, 8 *Term Rep.* 486. the ſame principle was held to apply, where the plaintiff twice carried the record down to trial and withdrew it. The rule that a Plaintiff is entitled to coſts up to the time of paying money into Court was laid down in *Hartley* v. *Bateſon*, *K. B.* 1 *Term Rep.* 629. where the Plaintiff had proceeded after the money paid in, but had not gone to trial: and though in *Griffiths* v. *Williams*, 1 *Term Rep.* 710. that rule was extended to the caſe of a Plaintiff who proceeded to trial, and obtained a verdict for the exact ſum paid into Court only, yet in *Stevenſon* v. *Yorke*, 4 *Term Rep.* 10. *Buller* J. obſerved that " that part of the caſe of *Griffiths* v. *Williams* could not be ſupported."

(*b*) See *Savage* v. *Franklyn*, *Barnes* 280. *Davis* v. *Maunſell*, *Barnes* 282. *Vane* v. *Mechell*, *Barnes* 284. and *Bate* v. *Crane*, *Barnes* 287. where coſts up to the time of paying the money into Court were allowed to the Plaintiff by the Court of *C. B.*; but it is to be obſerved, that in none of thoſe caſes had the Plaintiff proceeded to trial; and in *Davis* v. *Maunſell*, as reported in *Willes* 191. *Forteſcue Aland* J. ſays, the Plaintiff may take out the money at any time *before trial*, and will be entitled to coſts till the time of the money brought in.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED IN THE Courts of COMMON PLEAS AND EXCHEQUER CHAMBER, IN Hilary Term,

In the Fortieth Year of the Reign of GEORGE III.

RODGERS *v.* LACY.

Jan. 26th.

The 37 *G.* 3. *c.* 73. *ſ.* 3. having prohibited more than double monthly wages being given to ſeamen coming from the *Weſt Indies*, unleſs the captain be ſpecially licenſed to give a greater rate by the chief officer of the port, a general licence by ſuch chief officer to a captain, "to procure men on ſuch terms as he can," is void.

THIS was an action brought by the Plaintiff as a ſeaman, againſt the Defendant who was captain of the ſhip *Suffolk* for wages earned on a voyage from *Savannalamar* in *Jamaica*, to this country. The cauſe was tried before Lord *Eldon* Ch. J. at the *Weſtminſter* ſittings after laſt *Michaelmas* Term, when the following facts appeared in evidence: The Defendant being in great want of hands to navigate the ſhip home, and being reſtricted by the 37 *Geo.* 3. *c.* 73. *ſ.* 3. (*a*) from engaging any ſeamen in the *Weſt*

(*a*) That ſection enacts that no maſter or commander of any *Britiſh* ſhip which ſhall ſail for any port in *Great Britain* ſhall hire or engage any ſeaman, mariner, or other perſon at any port or place within his Majeſty's colonies or plantations in the *Weſt Indies*, to ſerve on board any ſuch ſhip at for greater or more wages or hire for ſuch ſervice, than according to the rate of double monthly wages; unleſs the governor, chief magiſtrate, collector, or comptroller of ſuch port or place ſhall think that more ought to be given, and do and ſhall accordingly authorize and direct the ſame to be given

1800.
RODGERS
v.
LACY.

Weſt Indies at more than double monthly wages, unleſs the governor or other chief officer of the port ſhould authoriſe him ſo to do under his hand, applied to the chief magiſtrate of the place where he was for ſuch a permiſſion, and obtained the following one: "*Jamaica,* " pariſh *Weſtmoreland*—Whereas it appears to me *G. M.* Eſq. " *Cuſtos Rotulorum* and chief magiſtrate in and for the pariſh of " *Weſtmoreland* by the oath of *L. Lacy* maſter of the ſhip *Suffolk* " now lying at anchor in the harbour of *Savannalamar* in the ſaid " pariſh and bound thence to the port of *London* in the kingdom " of *Great Britain* that he cannot engage ſeamen to carry his ſaid " ſhip home at the rate allowed by law. Theſe are therefore to " *licenſe and permit the ſaid* L. Lacy *to procure men on ſuch terms* " *as he can to navigate his ſaid ſhip now loaded and ready to depart* " *with the convoy for* Britain. Witneſs my Hand, &c. &c." Under this licence the Defendant engaged the preſent Plaintiff, agreeing to give him forty-five guineas at that time, (which was paid,) and 9 *l. per* month during the voyage, with half a pint of rum *per* day, and coffee night and morning. On the part of the Defendant it was objected, that the Plaintiff could not recover upon the above agreement, inaſmuch as the ſum agreed for was above the rate of double monthly wages, and the contract having been made under a general licence to the captain to give according to his diſcretion, inſtead of a licence regulating the preciſe ſum, was therefore void. His Lordſhip being of opinion that it was the intention of the legiſlature, with a view to prevent exorbitant wages being given, to deprive both the maſter and the mariner in ſuch caſes of the power of exerciſing their diſcretion, and to place the regulation of the price of wages in the hands of the chief officer of the port, who ought therefore to ſpecify in the licence the rate of wages allowed by him, nonſuited the Plaintiff, with liberty to move the Court for a verdict in his favour on the contract as proved.

Cockell Serjt. now moved for a rule *Niſi* to ſet aſide this nonſuit, and contended that the licence was ſufficient within the meaning

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given by writing under his hand; that then and in ſuch caſe the maſter and commander ſhall be at liberty to pay and the ſeamen to receive *ſuch greater or higher wages as ſuch governor,* &c. *ſhall direct as aforeſaid*; (his Lordſhip took notice of theſe latter words as evidencing the intent of the legiſlature beyondall doubt;) and all contracts, bonds, &c. contrary to the meaning of the act, ſhall be null and void, and the maſter of ſuch ſhip entering into ſuch contract ſhall forfeit 100 *l.*

of the act, the chief magiſtrate having, under the exiſting circumſtances, felt it impoſſible to fix the rate of wages himſelf.

But the *Court* were clearly of opinion both on the policy and letter of the act, that the nonſuit was right, and that if it were otherwiſe every chief magiſtrate in the ports of the *Weſt India* iſlands would have it in his power to annul the act.

Cockell took nothing by his motion.

KIDD *v.* RAWLINSON.

Jan. 27th.

The goods of *A.* being taken in execution and put up to ſale, *B.* became the purchaſer and took a bill of ſale of the ſheriff, but permitted *A.* to continue in poſſeſſion; *A.* then executed another bil of ſale of the ſame goods to *C.* a creditor, under which the latter took poſſeſſion; whereupon *A.* brought an action againſt *C.* for the goods. Held, that the firſt bill of ſale was valid, and that *A.* was therefore entitled to recover.

THIS was an action for money had and received.

An execution having iſſued againſt the goods of one *Aburn*, who kept a public houſe, his furniture was taken and put up to ſale by the Sheriff of *Surry*; the Plaintiff, who was *Aburn*'s brother-in-law, but not a creditor, became the purchaſer, and a bill of ſale was made out to him, dated 13th of *November* 1798; *Aburn* was by him permitted to continue in poſſeſſion of the goods in order that he might be able to carry on his buſineſs, but being ſoon after taken in execution and committed to priſon, he executed a bill of ſale of them, dated 11th of *March* 1799, to the Defendant, to whom he was indebted in the ſum of 16*l.* 5*s.*; the Defendant having taken poſſeſſion under this laſt bill of ſale, received a notice from the Plaintiff not to diſpoſe of the goods, ſtating his prior title; on the 14th of *March* the landlord of the premiſes authoriſed the Defendant to diſtrain to the amount of 12*l.* 10*s.* for rent due from *Aburn* for two quarters, which the Defendant accordingly paid, and on the 26th of the ſame month ſold the goods for 26*l.* 14*s.* 6*d.* The expences of the bill of ſale to the Defendant, of keeping poſſeſſion, and of the auction added to the rent advanced by the Defendant, amounted to 26*l.* 4*s.* 8*d.*; leaving a balance of 9*s.* 8*d.*; this being deducted from the debt due from *Aburn* to the Defendant, the latter ſtill remained a creditor of the former for 15*l.* 15*s.* 4*d.* The cauſe being tried before Lord *Eldon* Ch. J. at the *Weſtminſter* ſittings after laſt *Michaelmas* Term, his Lordſhip put it to the jury to ſay, Whether the Plaintiff had purchaſed the goods with a view to defeat any execution by any of the creditors of *Aburn?* And the jury being of opinion that the purchaſe was not made with that view, gave him a verdict for 14*l.* 4*s.* 6*d.*

Marſhall Serjt. now moved for a rule *Niſi* to ſet aſide this verdict and enter a nonſuit: he contended that the bill of ſale to the Plaintiff

1800.
Kidd
v.
Rawlinſon.

Plaintiff not having been accompliſhed and followed by poſſeſſion, was fraudulent and void, and cited *Edwards* v. *Harben*, 2 *Term Rep*. 587. and *Bamford* v. *Baron* in a note to that caſe.

Lord Eldon Ch. J. This action was brought to recover the produce of the ſale made by the Defendant after deducting the amount of the rent paid to the landlord. It is to be obſerved that the Plaintiff was not a creditor of *Aburn*, and did not buy the goods as the means of ſatisfying any debt of his own; nor indeed could he, for the Sheriff was to receive the money produced by the ſale: nor was the purchaſe made with a view to defeat creditors, but out of mere kindneſs to *Aburn* to whom the Plaintiff was related. If, under theſe circumſtances, the poſſeſſion of *Aburn* be ſufficient to make the bill of ſale fraudulent, the Plaintiff muſt ſuffer the legal conſequences of his benevolent diſpoſition. But it appears to me that this does not fall within the principle of *Twyne*'s (*a*) caſe, and the other caſes on this ſubject, where the parties ſtood in the relation of debtor and creditor, and where their object was to defeat the other creditors. This ſeems to me a new caſe; for here the goods were purchaſed at a public ſale by a perſon who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honeſt purpoſe. If *Kidd* had lent money to *Aburn* to buy theſe goods, and had then taken a conveyance of them, or a ſecurity for his debt thus ariſing out of the mere act of lending the money; leaving *Aburn* in poſſeſſion of the goods would not have been a fraudulent act. This appears from Mr. J. *Buller's Law of Niſi Prius*, p. 258., who after ſtating a caſe of conveyance which was holden to be fraudulent becauſe the donor continued in poſſeſſion, adds, "but yet the donor continuing in poſſeſſion is not in all caſes a mark of fraud; as where a donee lends his donor money to buy goods, and at the ſame time takes a bill of ſale of them for ſecuring the money." It will be difficult to diſtinguiſh the tranſaction in queſtion from this caſe. Indeed a public buying of the Sheriff ſeems to be more favourable to the Plaintiff. It appeared to me at the trial that *Kidd* might be conſidered as the donee of theſe goods lending money to *Aburn* to purchaſe them through the medium of the Sheriff, and taking a bill of ſale as a ſecurity for the money. I deſired the jury to ſay what they conſidered to be the object of the bill of ſale; and they were of opinion that it was the intention of the parties that the bill of ſale ſhould be a ſecurity for the money advanced to the Sheriff.

(*a*) 3 *Co*. 80.

Heath J. I ſee no reaſon for ſetting aſide this verdict. The caſe is clearly diſtinguiſhable from *Twyne*'s caſe, there being great notoriety in the whole of this tranſaction. Now it is to be obſerved, that Lord *Coke* in *Twyne*'s caſe recommends that gifts in ſatisfaction of a debt by one who is indebted to others alſo, ſhould be made in a public manner before the neighbours and not in private; for ſecrecy is a mark of fraud. Here there was no fraud or ſecrecy, and therefore I think the conſequences would be miſchievous if this Plaintiff's title were defeated.

Rooke J. I am of the ſame opinion.

Marſhall took nothing by his motion.

ENGLISH *v.* DARLEY.

Jan. 27th.

If the indorſee of a bill having ſued the acceptor to judgment, and taken out execution, receive of him a ſum of money in part payment, and take his ſecurity for the remainder, with the exception of a nominal ſum only; he is thereby precluded from afterwards ſuing the indorſer.

Assumpsit by the indorſee of a bill of exchange againſt the indorſer.

Lord *Eldon* Ch. J. before whom the cauſe was tried at the *Weſtminſter* ſittings after laſt *Michaelmas* Term, nonſuited the Plaintiff under the following circumſtances: Payment of the bill being refuſed when due, the Plaintiff commenced actions againſt the preſent Defendant and the acceptor, andhaving ſued the latter to judgment, took out *execution* thereon; but although the acceptor had ſufficient to anſwer the execution, the Plaintiff at his inſtance received 100*l.* in part payment of the bill, and took his bond and warrant of attorney as a ſecurity for the payment of the remainder by inſtalments, together with intereſt and coſts, excepting only a nominal ſum, with a view to enable him, the Plaintiff, to ſupport actions againſt the other parties to the bill.

Shepherd and *Lens* Serjts. now moved for a new trial, and contended that the holder of a bill of exchange after due notice given of non-payment is entitled to ſue all or any of the parties whoſe names are on the bill; and that although he receive from any one of them what may amount to a ſatisfaction as againſt him, yet that the others will not be diſcharged until the whole amount of the bill be paid; as in *Macdonald* v. *Bovington*, 4 *Term Rep.* 825. where the holder of a bill having ſued the acceptor and charged him in execution, he was allowed to ſue the drawer on the acceptor being diſcharged by an inſolvent act; and in *Hayling* v. *Mulhall*, 2 *Bl.* 1235. where it was laid down that the holder after having diſcharged one of the indorſers, whom he had taken in execution,

1800.

English
v.
Darley.

by a letter of licence, might ſue a prior indorſer. They inſiſted that each of the parties to the bill was in the nature of a co-ſurety, and therefore nothing ſhort of actual payment by one of them could be conſidered as a ſatisfaction in an action againſt any of the others, and cited *Dyke* v. *Mercer*, 2 *Show*. 394.

Lord Eldon Ch. J. It is very clear that the holder of a bill may at his election ſue any or all the parties to it, and that if they all become bankrupt, he may prove againſt the eſtates of all unleſs he receive part of the debt from any one. And although the debt be reduced from time to time by dividends, no part of the proof ſhall be expunged under any of the commiſſions till 20*s.* in the pound have been received. As long as the holder is paſſive, all his remedies remain; and if any of the parties be diſcharged by the act of law, as by an inſolvent debtors' act, that operation of law ſhall not prejudice the holder. With reſpect to *Hayling* v. *Mulhall*, it may be obſerved that the marginal abſtract of that caſe is incorrect; for it appears from the report that the perſon firſt ſued was a ſubſequent indorſer: had the Plaintiff firſt ſued a prior indorſer and diſcharged him from execution, it would have afforded a ſufficient objection to an action againſt a ſubſequent indorſer. If a holder enter into an agreement with a prior indorſer in the morning not to ſue him for a certain period of time, and then oblige a ſubſequent indorſer in the evening to pay the debt, the latter muſt immediately reſort to the very perſon for payment to whom the holder has pledged his faith that he ſhall not be ſued. In the caſe *Ex parte Smith* (*a*) Lord *Thurlow*, after conſulting with all the Judges, was of opinion that the holder of a bill by entering into a compoſition with the acceptor diſcharged the indorſer, and accordingly ordered the proof againſt the eſtate of the latter to be expunged, proceeding on the ground of the acceptor's liability being varied by the act of the holder. We all remember the caſe where Mr. *Richard Burke* being co-ſurety for an annuity, the grantee gave time to the principal, and yet argued that Mr. *Burke* was not relieved thereby, though the principal was; but it was anſwered that the grantee could make no demand upon the co-ſurety, becauſe he muſt by ſo doing enforce a payment from the principal contrary to the agreement. Here the Plaintiff having taken a new ſecurity from the acceptor, has diſcharged the Defendant.

Heath and **Rooke** Js. were of the ſame opinion.

Shepherd and *Lens* took nothing by their motion.

(*a*) *Co. B. L.* 168. 172. *Ed.* 4.

Williamson *v.* Butterfield and Another, Executors of J. Braley.

Jan. 29th.

A. being poſſeſſed of a leaſe for years, covenanted in an indenture for making a family proviſion, that if he ſhould die during the continuance of the Term of the leaſe, his executors or adminiſtrators ſhould aſſign the reſidue to *B.*: *A.* afterwards purchaſed the reverſion in fee and died; Held, that *A.* did not by the terms of the covenant intend to preclude himſelf from purchaſing the fee, and therefore his executors were not liable upon that covenant.

Covenant. The declaration ſtated, that *J. Braley* in his life-time was poſſeſſed of a certain leaſe of certain marſh lands and tenements, of which at the time of making the after-mentioned indenture there were eight years then to come and unexpired; that an indenture was entered into between *C. Williamſon* (the Plaintiff) of the firſt part, the ſaid *J. Braley* of the ſecond part, and one *J. Morgan* of the third part, which after reciting that *C. Williamſon* and *J. Braley* were deſirous of making ſome proviſion for the ſupport of *Mary Williamſon*, the wife of *James Williamſon*, who had left her and gone abroad, (ſhe being the ſiſter of the ſaid *J. Braley* and ſiſter in law of the ſaid *C. Williamſon*,) and alſo for the maintenance and education of her children by the ſaid *James Williamſon*, and therefore that *C. Williamſon* had offered and agreed to allow 30*l. per* annum during his life, and to leave at his death 600*l.* for the ſame purpoſe, and the intereſt of which ſhould be applied in lieu of the 30*l. per* annum, and that *J. Braley* had alſo agreed to allow 20*l. per* annum during his life in caſe *C. Williamſon* the younger ſhould continue to live with him or be kept at ſchool, and found and provided by him with board and other neceſſaries, but if he ſhould ceaſe to live with him and quit him with his conſent, then *J. Braley* agreed to allow 35*l. per* annum; And reciting that *C. Williamſon* and *John Braley* for carrying into execution their intentions, and ſecuring payment of the ſaid ſums, bound themſelves to *J. Morgan* in 1200*l.* with conditions to perform all the covenants thereafter mentioned; witneſſed, That *C. Williamſon* covenanted with *J. Morgan* to perform his part of the above-mentioned agreements, and that *J. Morgan* ſhould receive the ſaid ſums allowed by *C. Williamſon* as aforeſaid, upon the truſts declared concerning the ſame (which were adapted to carry into effect the agreement above-mentioned); and that *J. Braley* alſo covenanted with *J. Morgan* to perform his part of the above-mentioned agreement in the ſame manner; And laſtly, that it was agreed by all the parties that in caſe *Mary Williamſon* ſhould miſbehave herſelf to the diſapprobation of *C. Williamſon* and *J. Braley* it ſhould be lawful for *J. Morgan*, his executors or adminiſtrators, on the ſame being ſignified to him by *C. Williamſon* and *J. Braley*,

1800.

WILLIAMSON *v.* BUTTERFIELD.

to apply the above ſums for the maintenance of the children only, in ſuch manner as *C. Williamſon* and *J. Braley* ſhould direct; That after further reciting "that it had been agreed by and between the ſaid *J. Braley* and *C. Williamſon*, that *in caſe he the ſaid* J. Braley *ſhould happen to die during the continuance of the term of the leaſe*, under which the ſaid *J. Braley* then held the marſhes in the pariſh of *Laindon*, in the county of *Eſſex*, called *Biſhop's Lands*, that his executors or adminiſtrators ſhould immediately thereupon deliver the poſſeſſion thereof, and aſſign the reſidue of ſuch term unto the ſaid *C. Williamſon*, his executors, adminiſtrators, and aſſigns, and that from thenceforth he the ſaid *C. Williamſon* ſhould pay to the ſaid *John Morgan*, his executors or adminiſtrators, the further yearly ſum of 30 *l.* during the continuance of the ſaid term upon the truſts therein-before mentioned, the ſaid *J. Braley* did thereby covenant and agree to and with the ſaid *C. Williamſon*, that *in caſe of his ſaid dying as aforeſaid*, his executors or adminiſtrators ſhould immediately, and he the ſaid *J. Braley* did thereby direct them to deliver immediate poſſeſſion to the ſaid *C. Williamſon* of the ſaid marſhes, and to aſſign to him, his executors, adminiſtrators, and aſſigns, the leaſe under which he held the ſame for the reſidue then to come of the term thereby granted; and the ſaid *C. Williamſon* in conſideration thereof did thereby covenant, promiſe, and agree to pay or cauſe to be paid unto the ſaid *J. Morgan* the further yearly ſum of 30 *l.* of like lawful money of *Great Britain* during the continuance of the ſaid term of the ſaid leaſe, to, for, and upon the ſeveral truſts, intents, and purpoſes therein before mentioned. And it was thereby mutually agreed between the ſaid *J. Braley* and *C. Williamſon*, that if the ſaid *C. Williamſon* ſhould in the life-time of the ſaid *J. Braley* purchaſe the ſaid land, that the ſaid *J. Braley* ſhould continue tenant thereof during his life at the ſame rent he then held the ſame." The declaration then averred the death of *J. Braley*, and the appointment of the Defendants as his executors, the performance by *C. Williamſon* of his part of the covenants, and a demand made by him upon the Defendants to deliver up immediate poſſeſſion of, and aſſign to him the leaſe under which they were held, and a refuſal by them ſo to do.

Plea that *J. Braley* after the making of the indenture in the declaration mentioned, and during the continuance of the ſaid term, purchaſed the reverſion in fee," Whereby the ſaid leaſe in the ſaid declaration mentioned, then and there became void, and the

1800.

WILLIAMSON *v.* BUTTERFIELD.

ſaid term thereby granted, and in the ſaid declaration mentioned, then and there became, and was and ſtill is merged, ſurrendered, and extinct in law. And the Defendants as executors aforeſaid, by reaſon thereof, could not upon the death of the ſaid *J. Braley* deliver immediate poſſeſſion, nor have they as ſuch executors at any time ſince been able or capable of delivering poſſeſſion, nor can they now deliver poſſeſſion of the ſaid marſhes and tenements in the ſaid declaration mentioned, or aſſign the reſidue of the ſaid term by the ſaid leaſe granted unto the ſaid Plaintiff, his executors, adminiſtrators, or aſſigns, according to the form and effect of the ſaid indenture in the ſaid declaration mentioned, and of the covenant of the ſaid *J. Braley* deceaſed, in that behalf made as aforeſaid. And this," *&c.*

To this there was a general demurrer and joinder therein.

When this caſe firſt came before the Court, no part of the indenture now ſet out in the declaration, except the covenant of *J. Braley* that his executors ſhould aſſign, appeared on the record. The declaration then contained a ſecond breach, which ſtated that *J. Braley* in his life-time purchaſed the whole eſtate, whereby his executors were unable to aſſign any reſidue to the Plaintiff. To this breach the Defendant had demurred.

In ſupport of which demurrer, *Shepherd* Serjt. in laſt *Michaelmas* term contended, that the clear meaning of the covenant was, that if the covenantor ſhould happen to die poſſeſſed of the term, his executors ſhould aſſign to the Plaintiff; but that as the covenantor had purchaſed the reverſion in fee in his liſe-time, he did not die poſſeſſed of the term, and therefore his executors were excuſed; and obſerved, that the words " in caſe of his ſaid dying *as aforeſaid*," muſt be conſtrued, in caſe of his dying as mentioned in the former part of the deed. He cited *Walter* v. *Montague*, 2 *Roll. Rep.* 332.

Sellon Serjt. *contrà* inſiſted, that where a man creates a charge upon himſelf by his own contract, nothing can relieve him from it, much leſs an act of his own. He cited Sir *A. Mayne*'s caſe, 5 *Co.* 20. *Cro. Eliz.* 479. S. C. *Paladine* v. *Jane*, *Alleyn*, 26. *Earl of Cheſterfield* v. *Duke of Bolton*, *Com.* 627. *Bullock* v. *Dommitt*, 6 *Term Rep.* 650. *Brecknock Company* v. *Pritchard*, 6 *Term Rep.* 750. *Doe* d. *Mitchenſon* v. *Carter*, 8 *Term Rep.* 300.

The Court thinking the whole deed material to the conſtruction of the covenant in queſtion, ordered the parties to amend.

Accordingly the deed being ſet forth in the declaration, and the ſecond breach and demurrer thereto being ſtruck out, the caſe now came on to be argued on the demurrer to the plea.

Sellon in ſupport of that demurrer. This is a conditional covenant, that the executors of the covenantor ſhall do a certain act in caſe he die during the continuance of the term of the leaſe; and for the Defendants it is contended that he did not die during the continuance of that term. The word "term" may be taken in two ſenſes, either as a limitation of time for which the eſtate is to continue, or as the eſtate itſelf. *Sheph. Touch. c.* 14. *p.* 267. *Ed.* 1651. The former, however, is the more uſual acceptation of the word, and the only one to be found in moſt of the law dictionaries. In this caſe the words that precede and follow it ſhew that it was uſed in the common ſenſe. Had the expreſſions been "during the term," or "during the leaſe," they might have been conſidered as deſcribing the eſtate, but the words "during the continuance of the term of the leaſe," can bear no other ſenſe than during the continuance of the time which the leaſe has to run. The object of the covenant was to make a proviſion for *Mary Williamſon;* and *C. Williamſon*, in conſideration of having this term aſſigned to him by *J. Braley*'s executors, undertook to allow her a certain ſum after *J. Braley*'s death as long as the term laſted. Now if *J. Braley* had it in his power to defeat the covenant, he had it in his power thereby to deprive *Mary Williamſon* of the proviſion intended for her. A ſtipulation is inſerted in the deed in the caſe of *C. Williamſon* purchaſing the fee of theſe premiſes, that *J. Braley* ſhall continue to hold them as tenant, but no ſtipulation is made in caſe of its being purchaſed by *J. Braley;* it is therefore to be inferred that the parties did not intend that *J. Braley* ſhould be at liberty to purchaſe the fee. If on the other hand it be urged that the Plaintiff ſhould have provided for this event by a covenant, it may be obſerved, that *J. Braley* was the covenantor, and that all omiſſions muſt be taken moſt ſtrongly againſt him. (He was then proceeding to argue that it was not in the power of *J. Braley* to defeat the covenant by his own act, but the Court interfered, and ſtopped *Shepherd* who was on the other ſide).

Lord Eldon Ch. J. The ſecond point to which my Brother *Sellon* was proceeding aſſumes the meaning of this covenant to be, that if *J. Braley* ſhould die within the number of years unexpired at the time when the covenant was made, his executors ſhould aſſign the reſidue to *C. Williamſon*. On this head an important queſtion might ariſe, Whether, conſidering the purchaſe as the act of *J. Braley*, he could defeat the covenant ſo underſtood? I ſhould have no difficulty in ſaying that he could not, becauſe it would be incompetent to him to ſay that he did not mean *C. Williamſon* to have the benefit of ſo many years as ſhould be unexpired at his death. The Court can only collect the meaning of the parties from what is expreſſed upon the deed, and the undertaking of the covenantor muſt be made good according to the terms of the covenant. If the import of the inſtrument be, that on the ſuppoſition of the term exiſting under the leaſe at the time of his death, then if he ſo die during the term ſo exiſting under that leaſe, it ſhall be aſſigned to *C. Williamſon*, whatever may have been the meaning of the parties, the Court muſt not indulge in conjecture, but muſt put that conſtruction on the covenant which is warranted by the terms of the deed. It does ſeem to me, however, that the terms of the inſtrument have done juſtice to the intent of the parties. *J. Braley* meant, that if he died poſſeſſed of the term under the leaſe, *C. Williamſon* ſhould take the reſidue of that term; but I find nothing in the deed which calls upon the Court to ſay that *J. Braley*, who was giving a benefit to the children, might not put an end to the term, and provide for the children in any other way that he pleaſed. The circumſtance of *C. Williamſon* having entered into a covenant in caſe of his purchaſing the reverſion, affords ſtrong ground to infer that *Braley* did not mean to bind himſelf to any thing in caſe it ſhould be purchaſed by him. And are we to imply between parties covenanting with each other, that their covenants were intended to extend to a caſe not expreſſed in terms, merely becauſe it is not ſo expreſſed? It is obſervable that *Braley* covenants that in caſe he ſhould die during the continuance of the term, his executors and adminiſtrators, who would be the perſons repreſenting him in reſpect of his intereſt in this term, ſhould aſſign the reſidue to *Williamſon*; ſaying nothing of the heir upon whom the intereſt would devolve in caſe he ſhould purchaſe the fee. The covenant further ſtates, that the executors and adminiſtrators "ſhall deliver immediate poſſeſſion to the ſaid *C. Williamſon* of the ſaid marſhes, and aſſign to him his heirs, *&c.* the leaſe under which he (*Braley*) held the ſame, for the reſidue then to come of the term thereby granted." This ſuppoſes a term and intereſt ſubſiſting which may be availably aſſigned. *J. Braley* having a certain intereſt in the marſhes, and it being competent to him to purchaſe the whole fee, *C. Williamſon* covenanted to make certain additional proviſions for *M. Williamſon* and her children, in caſe the term ſhould be aſſigned to him, and as long as it ſhould laſt. He therefore has no reaſonable cauſe of complaint, ſince his obligation only ariſes from the time of the term being aſſigned to him. In fact, *J. Braley* ſeems to have been anxious to ſecure to himſelf the tenancy of the premiſes at all events, but to have avoided ſaying that he would not purchaſe a larger intereſt. If the parties to a deed will not expreſs their intentions, the Court cannot by conſtruction inſert a proviſion, however well ſatisfied they may be that the parties ought to have provided for any particular event.

HEATH J. I am of the ſame opinion. In conſtruing covenants the Court cannot extend them beyond their natural import. It has been ſaid that the object of the covenant was to provide for *M. Williamſon* and her children, and that unleſs the conſtruction contended for by the Plaintiff be adopted the covenant will be ineffectual. But it appears to me to have been matter of mutual accommodation. It was agreed, that if *C. Williamſon* ſhould purchaſe the fee, the leaſe ſhould be continued to *J. Braley* during his life, and that if *J. Braley* ſhould die during the continuance of the leaſe, the reſidue ſhould be aſſigned to *C. Williamſon*. But it does not appear that he intended to preclude himſelf from purchaſing the reverſion: and it would be ſtrange to draw a concluſion to that effect from the omiſſion of any covenant reſpecting it. Then it is argued that it was not competent to him to defeat his covenant by his own act. But if a man convey a defeaſible intereſt, there is no reaſon why he ſhould not defeat that intereſt. Thus, if a rector of a pariſh grant an annuity chargeable on his living, and enter into no covenant, if he ſurrender his living the next day, the grantee will be defeated. That caſe ſeems to me ſimilar to the preſent.

ROOKE J. I am of the ſame opinion.

Judgment for the Defendants.

1800.

Feb. 1ſt.

MARTIN *v.* KENNEDY.

BANNING *v.* PERRY.

If *A.* and *B.* having recovered in ſeparate actions for libels againſt different parties engaged in the management and publication of the ſame newſpaper, commence freſh actions againſt the ſame parties, each ſuing that party againſt whom the other has recovered, the Court will not interfere in a ſummary way to ſet aſide the latter proceedings.

THE defendant *Kennedy* being the printer, and *Perry* the proprietor of a newſpaper called *The Morning Chronicle*, the preſent Plaintiffs brought actions againſt them and *Lambert* the publiſher for two libellous advertiſements: *Martin* firſt ſued *Perry* the proprietor, and *Banning* ſued *Kennedy* the printer: in both theſe actions judgment was ſuffered by default; and writs of inquiry being executed, 40*s.* were recovered in the former, and 5*l.* in the latter. Each of the plaintiffs then ſued *Lambert* the publiſher, and judgment having been ſuffered by default in theſe actions alſo, and writs of inquiry executed, a farthing only was given in each caſe. After this the preſent actions were commenced, *Martin* ſuing *Kennedy* the printer, and *Banning* ſuing *Perry* the proprietor. The ſame attorney was employed by the plaintiffs in all the actions.

Bayley Serjt. on a former day moved for a rule calling on the Plaintiff to ſhew cauſe why the proceedings in theſe two laſt actions ſhould not be ſet aſide with coſts, and cited *Bird* v. *Randall*, 3 *Burr.* 1345, and 1 *Bl.* 387. S. C.

The Court granted the rule *niſi* but expreſſed great doubts reſpecting the ſucceſs of the application.

Shepherd Serjt. now ſhewed cauſe. If the Plaintiffs in theſe actions have received that which amounts to a ſatisfaction in law, the Defendants may put that fact upon the record as a defence: ſo if two actions be brought for the ſame cauſe, a Defendant may plead in abatement of one that the other is pending; and if the ſecond be brought after judgment obtained in the firſt, that judgment may be pleaded in bar. But neither of the above caſes affords any ground for an application to ſtay proceedings in a ſummary way. The Court never interferes in that manner unleſs it be to prevent an abuſe of its proceſs. Thus, where treſpaſs has been committed by two, and the Plaintiff having already brought an action againſt one, commences another action againſt both, the Court will interfere: not on the ground of ſatisfaction having been received by the plaintiff, but becauſe one of the Defendants has already been ſued.

Bayley in ſupport of the rule. The plaintiffs having recovered a complete ſatisfaction for the act of publication of which they now complain, the Court may interfere without driving the

MARTIN
v.
KENNEDY.

Defendants to plead it. That the act of publication now complained of is the ſame act for which the Plaintiffs have already ſued, appears both upon the declarations and upon the affidavits in anſwer to the rule. In the latter the Plaintiffs inſiſt that they have not recovered an adequate ſatisfaction; not that any new or diſtinct act of publication has taken place. In *Bird* v. *Randall*, which was an action on the caſe for ſeducing a ſervant out of the Plaintiff's ſervice, the Plaintiff having previouſly recovered from the ſervant the penalty in which he had bound himſelf by articles, the Court held that the action could not be ſupported; and Lord *Mansfield* in the concluſion of his judgment ſaid: "My Brother *Denniſon* ſuggeſts to me that the Court would, upon the application of the preſent Defendant, *by way of motion*, have ſtayed the Plaintiff's proceeding further againſt him, upon the Defendant's ſhewing them that the Plaintiff had actually received the money recovered by him in his former action againſt the ſervant." In *Com. Dig.* tit. *Action*, (K. 4), a diſtinction is taken between damages certain and uncertain, and it is there ſaid that in the lattercaſe a recovery and execution againſt one of ſeveral is a bar to an action againſt any of the others; as in trover againſt *I. S.* for the ſame goods for which the plaintiff had already ſued another to judgment and execution. *Broome* v. *Wootton*, *Yelv.* 67. *Cro. Jac.* 73. S. C. (*a*); and the ſame in treſpaſs, *Lendall* v. *Pinfold*, 1 *Leon.* 19. *Anon.* 3 *Leon.* 122. *Litt. pl.* 376. (*b*); and in *Cocke* v. *Jennor*, *Hob.* 66. it was laid down, that if ſeveral defendants in treſpaſs be ſued in ſeveral actions, though the plaintiff make choice of the beſt damage, yet when the plaintiff hath taken one ſatisfaction he can take no more; and if he require two, an *auditâ querelâ* will lie. Now, wherever a party is entitled to an *auditâ querelâ*, the Court will relieve in a ſummary way.

Lord ELDON Ch. J. Though every attempt to ſhorten litigation is entitled to the favour of the Court, yet before we ſtop a party in a regular courſe of proceeding, we ought to be certain that we ſhall not deprive him of that juſtice which the law authorizes him to ſeek. There are certainly many caſes in which it is held that a party is not entitled to maintain different actions for the ſame cauſe. But the preſent application in fact amounts to this: the Defendant, inſtead of putting that upon the record which may or may not be a good defence, applies to the Court by affidavit to compel the Plaintiff to diſcloſe the evidence upon which he means

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(*a*) *Vide etiam Morton's Caſe, Cro. Eliz.* 30.

(*b*) *Vide etiam Sir Humphrey Ferrers* and *Others*, v. *Archer, Cro. Eliz.* 667.

to go to trial. In actions of treſpaſs for taking away poſts, or deſtroying graſs in a field, where ſeveral perſons are concerned, the amount of the injury ſuſtained is aſcertained by the very nature of the act: and when a compenſation in damages has been once received, the Court may very reaſonably prevent the plaintiff from ſeeking the ſame compenſation a ſecond time. In *Bird* v. *Randall* no ſummary application was either made or granted. The teſt laid down in *Kitchen* v. *Campbell*, 3 *Wils.* 308. 2 *Bl.* 831. S. C. by which it may be aſcertained where a recovery in one action is a bar to another, is this, *viz.* where the ſame evidence will ſupport both the actions. At any rate the preſent caſe differs materially from all which have been cited, becauſe the injury done is an injury to character. Now character will be affected according to the extent of the circulation of the libel; and the injury may be very different according to the manner in which it is committed: the damage ſuſtained will be much varied, whether the libel be publiſhed in a coffee-houſe at *York* among perſons with whom it is peculiarly the intereſt of the plaintiff to ſtand well in point of character, or in ſome other place where it is of leſs importance. So the perſon who diſperſes the libel as a mere agent, and the principal himſelf, ought to ſuffer in very different degrees, becauſe the former is comparatively innocent. We muſt be very ſure of our ground before we ſtop a party in this ſtage of the proceedings; ſince we muſt do it at the peril of being right, as we thereby prevent him from producing any evidence to ſhew that the cauſes of action were eſſentially different, and deprive him of his writ of error.

Heath J. I am of the ſame opinion. It is clear that if a ſatisfaction has been recovered the plaintiff may avail himſelf of that circumſtance in ſome way or other. He may plead it or give it in evidence; or if the ſatisfaction has been obtained after trial, perhaps the Court might interfere in a ſummary way and not put the party to his *audita querela*. But it was never known that becauſe a recovery has been had the Court will ſtop the proceedings *in limine*. Suppoſe a defendant to have taken the Plaintiff's receipt, and the latter to declare for goods ſold and delivered; the Court could not interfere to ſtay proceedings, for that would be trying the queſtion in a ſummary way. I only underſtand *Mr. Juſtice Denniſon* to have ſaid in *Bird* v. *Randall*, that if the party has no other remedy the Court will do him juſtice.

Rooke J. There is no doubt that the Court in many caſes will relieve on motion, where different actions are brought for the ſame cauſe, inſtead of putting the party to plead. But this caſe is of a peculiar ſort, and not like treſpaſs, where the preciſe injury is aſcertained by the act itſelf. The damage ariſing from a libel depends much upon the mode of its publication. The caſes cited, therefore, do not apply.

Rule Diſcharged with coſts.

DAVIS and Others *v.* DAVENPORT.

Feb. 4th.

The Court will not diſcharge a defendant out of cuſtody on the ground of the affidavit of delivery of the declaration, not having been filed within 20 days of the delivery, if it be by way of detainer.

On a former day *Runnington* Serjt. moved to diſcharge the Defendant in this action out of the cuſtody of the warden of the *Fleet* on entering a common appearance. The ground of the application was, that the affidavit of the delivery of the declaration was not filed in due time, according to the rule of *E.* 5 *Will.* & *Mar. Reg.* 2.; the declaration itſelf having been delivered by way of detainer on the 3d of *January* as of *Michaelmas* Term, and the affidavit of the delivery not having been filed until the 24th of that month, whereas by the rule it is required to be filed within twenty days of the delivery.

The Court finding, upon inquiry from the officers, that in practice the rule was not held to extend to the caſe of a declaration delivered by way of detainer, refuſed a rule *niſi*.

On this day *Runnington* mentioned it again, and cited *Impey's Prac. C. B.* 689. and 694. *ed.* 4. and referred to the caſe of *Pagar* v. *Hadgely* in the former page:

But the Court abiding by the opinion of the officers, he took nothing by his motion.

THYATT *v.* YOUNG.

Feb. 4th.

The Court will not allow *non aſſumpſit* and alien enemy to be pleaded together.

Best Serjt. ſhewed cauſe againſt a rule *niſi* obtained on a former day for pleading the ſeveral matters of *non aſſumpſit* and alien enemy; and relied on *Feron* v. *Ladd*, 2 *Bl.* 1326. and *Angerſtein* v. *Vaughan*, *ante*, vol. 1. p. 222. *in notis*.

Heywood Serjt. *contrà* urged that as the Defendant might give in evidence under the general iſſue that the Plaintiff was alien enemy, there could be no objection to allowing him to put it on record together with *non aſſumpſit*; and compared the plea of alien enemy to the pleas of infancy and coverture.

But *the Court* refuſed to allow the application.

Per Curiam, Rule Diſcharged.

Feb. 4th.

PARKER *v.* BAYLIS and Wife.

“WILLIAM *Baylis* and *Mary* his wife, which ſaid *Mary* is the adminiſtratrix with the will annexed of all and ſingular the goods and chattels, rights and credits which were of *Eliz. Stattard* deceaſed at the time of her death which remain unpaid and unſatisfied, were attached to anſwer unto *John Parker &c.* For that whereas before and at the time of the making of the promiſe and undertaking of the ſaid *William* and *Mary* his wife hereinafter next mentioned, the ſaid *John* was beneficially intereſted in and entitled to a certain large quantity (that is to ſay) 533 *l.* 6 *s.* 8 *d.* of a certain ſtock or fund commonly called the 3 *per cent. South Sea Annuities*, then ſtanding and being in the books of the *South Sea Company* in the name of the aforeſaid *Elizabeth Stattard* deceaſed, to which ſaid *Elizabeth Stattard* deceaſed the ſaid *Mary* the wife of the ſaid *William* was the next of kin then ſurviving; on which ſaid ſtock or fund certain dividends were then and there due in arrear and unpaid to which ſaid dividends the ſaid *John* was alſo then and there entitled; and whereas in order to obtain payment of the ſaid dividends it became and was neceſſary, according to the practice of the ſaid *South Sea Company*, that application for ſuch payment of the dividends which were ſo in arrear ſhould be made by and on the behalf of the executors or adminiſtrators of the ſaid *Elizabeth Stattard* deceaſed, in whoſe name the ſaid ſtock or funds then ſtood in the books of the ſaid *South Sea Company*, of all which premiſes the ſaid *William* and *Mary* his wife had due notice; and thereupon heretofore, to wit, on, &c. in conſideration that the ſaid *John*, at the ſpecial inſtance and requeſt of them the ſaid *William* and *Mary* his wife, had procured adminiſtration to be granted to the ſaid *Mary* the wife of the ſaid *William* as the ſurviving reſiduary legatee of the ſaid *Elizabeth Stattard* deceaſed, with the will annexed of the unadminiſtered goods of the ſaid *Elizabeth Stattard*, for the purpoſe of obtaining by their means and medium payment of the ſaid dividends ſo in arrear as aforeſaid, unto and to the uſe of him the ſaid *John*, and had agreed to bear, pay, and diſcharge all the expences of obtaining ſuch adminiſtration as aforeſaid, they the ſaid *William* and *Mary* his wife, ſo being ſuch adminiſtratrix as aforeſaid, undertook and then and there faithfully promiſed the ſaid *John* that as ſoon as the payment of the dividends then due and in arrear as aforeſaid ſhould be obtained by them, that they the ſaid *William* and *Mary* his wife, adminiſtratrix as aforeſaid,

A. declared againſt B. and his wife adminiſtratrix of C. deceaſed: For that whereas C. died inteſtate, poſſeſſed of South Sea Stock which ſhe held in truſt for A. and upon which certain dividends were due, in conſideration that A. at his own expence would procure adminiſtration to be granted to the wife of B. as next of kin to C. and would furniſh evidence to enable B. and his wife to receive the dividends; B. and his wife as ſuch adminiſtratrix promiſed to pay over to B. the amount of the dividends when received. Held, that the conſideration ſtated was inſufficient to ſupport the promiſe. Held alſo, that as the dividends never made part of the inteſtate's eſtate, the action againſt B. and his wife as adminiſtratrix could not be maintained.

would pay the amount of the ſaid dividends to him the ſaid *John* when they the ſaid *William* and *Mary* his wife, adminiſtratrix as aforeſaid, ſhould be thereto afterwards requeſted. And the ſaid *John* avers that he the ſaid *John* having at his own proper coſts and charges ſo obtained and procured ſuch adminiſtration to be granted to the ſaid *Mary* the wife of the ſaid *William* for the purpoſe of obtaining by the means and medium of him the ſaid *William* and *Mary* his wife, as ſuch adminiſtratrix, payment of the ſaid dividends ſo in arrear as aforeſaid to be made to and to the uſe of him the ſaid *John*, and the ſaid *Mary* the wife of the ſaid *William*, by and with the conſent, privity, and authority of the ſaid *William*, having accepted and taken upon herſelf the burthen of ſuch adminiſtration for the purpoſe aforeſaid, they the ſaid *William* and *Mary* his wife, as ſuch adminiſtratrix as aforeſaid, afterwards and after ſuch adminiſtration was ſo obtained and procured for and granted to the ſaid *Mary* the wife of the ſaid *William* aforeſaid, to wit, on, *&c.* at, *&c.* obtained, procured, and received payment of the ſaid dividends then due and in arrear on the ſaid ſtock or fund as aforeſaid to a great and conſiderable amount, to wit, to the amount of 500 *l.* of lawful money of *Great Britain*, yet the ſaid *William* and *Mary* his wife, adminiſtratrix as aforeſaid, not regarding, *&c.* have not as yet paid the amount of the ſaid dividends or any part thereof to him the ſaid *John*, although ſo to do he the ſaid *William* and *Mary* his wife, ſo being ſuch adminiſtratrix as aforeſaid, were requeſted by him the ſaid *John* afterwards, to wit, on, *&c.* and often afterwards, to wit, at, *&c.* but have refuſed, *&c.* contrary to the form and effect of the ſaid promiſe and undertaking of them the ſaid *William* and *Mary* his wife, adminiſtratrix as aforeſaid, and in breach and violation thereof, to wit, at, *&c.*"

The 2d count, after ſtating that there was a certain quantity of *South Sea Stock* to which the plaintiff was entitled, and that he at the requeſt of *Baylis* and his wife had at his own expence procured adminiſtration to be granted to the wife of *Baylis* for the purpoſe of obtaining payment of the dividends by their means, averred, that "in conſideration of the premiſes laſt aforeſaid, and that the ſaid *John* would furniſh and ſupply them with evidence to entitle them to payment of the dividends ſo due in arrear as laſt aforeſaid for the purpoſe laſt aforeſaid, they the ſaid *William* and *Mary*, as adminiſtratrix, as aforeſaid undertook," *&c.* as before. The 3d count was on a promiſe by "the ſaid *William* and *Mary* adminiſtratrix as aforeſaid," for money had and received "by the ſaid *Mary* adminiſtratrix as aforeſaid." And the 4th was on an account

1800.

Parker
v.
Baylis.

ſtated by the huſband and wife adminiſtratrix, and the promiſe was alleged to have been made by both.

To the three firſt counts there was a ſpecial demurrer, aſſigning for cauſes "that the ſaid *John* hath in and by the ſaid three firſt counts of the ſaid declaration declared againſt the ſaid *Mary* as adminiſtratrix with the will annexed of all and ſingular the goods and chattels, rights and credits which were of *Elizabeth Stattard* deceaſed at the time of her death remaining unpaid and unſettled, for certain ſuppoſed cauſes of action ariſing after the death of the ſaid *Elizabeth Stattard* and with which the ſaid *Mary* is not chargeable as adminiſtratrix as aforeſaid; and alſo for that no ſufficient conſideration is laid or alleged for the ſuppoſed promiſes and undertakings in the ſaid firſt and ſecond counts of the ſaid declaration mentioned; and alſo for that it is not ſtated or alleged, nor does it appear in or by the ſaid third count of the ſaid declaration that the money therein mentioned to have been had and received by the ſaid *Mary* as adminiſtratrix as aforeſaid, to and for the uſe of the ſaid *John*, was had and received by her the ſaid *Mary* on her own account, or as adminiſtratrix as aforeſaid in right of the ſaid *Elizabeth Stattard*, nor whether the ſame was had and received by the ſaid *Mary* before or after her intermarriage with the ſaid *William*; and alſo for that the ſaid three firſt counts of the ſaid declaration are in other reſpects uncertain inſufficient and informal." On the laſt count the Defendant tendered iſſue.

Joinder in demurrer and iſſue.

Shepherd Serjt. in ſupport of the demurrer. The Plaintiff has charged the huſband and wife jointly on a promiſe made by the wife as adminiſtratrix after the death of the inteſtate. Now in ſuch a caſe the wife cannot be conſidered as liable *quâ* adminiſtratrix, ſince a right of action can only ariſe againſt her in that capacity from the liability of the deceaſed, on the nonperformance of his contracts. Thus if *A.* covenant that his executors ſhall within a certain time after his death pay money, or do ſome act, and they omit to do ſo, an action lies againſt the executor as ſuch, not becauſe they have broken the contract, but becauſe the teſtator has not ſecured the performance of his undertaking. Their failure after the teſtator's death gives the right of action againſt them in the capacity in which they are placed, but the failure of the teſtator is the cauſe of that right of action. This appears from another inſtance; where *A.* covenants for himſelf and his executors that *B.* ſhall do an act within ſix months after *A.*'s death, no action lies againſt *B.* for not doing the act, but it lies againſt the executors of *A.* becauſe *B.*'s failure is not the foundation or gift of the action, which ariſes from the nonperformance of *A.*'s contract. Executors as ſuch are not liable beyond the aſſets, unleſs they bind themſelves by a perſonal contract. The ground of ſuch a contract indeed, is their being in the ſituation of executors: but the judgment againſt them will be *de bonis propriis*, not *de bonis teſtatoris*; and in ſuch caſe *plene adminiſtravit* cannot be pleaded. If then the Defendants here cannot plead *plene adminiſtravit*, and the judgment againſt them muſt be *de bonis propriis*, it is clear that the action is brought on the perſonal contract of *Mary Baylis*, and not againſt her *quâ* adminiſtratrix. All the caſes ſhew that where an action is brought againſt an executor on promiſes made by him after the death of the teſtator, he is charged in his own right. *Trewinian* v. *Howell*, *Cro. Eliz.* 91. *Wheeler* v. *Collier*, *Cro. Eliz.* 406. *Davis* v. *Wright*, 1 *Vent.* 120. *Scott* v. *Stevens*, 1 *Sid.* 89. *Atkyns* v. *Hill*, *Cowp.* 284. and *Hawkes* v. *Saunders*, *Cowp.* 289. But if it appear that the preſent action is brought on the perſonal contract of *Mary Baylis*, then it is clear that no action can be maintained againſt huſband and wife, on a promiſe of the wife after marriage. Indeed the huſband is never liable on a contract made by the wife during coverture, but where that contract is conſidered as having been entered into by her as his agent. And this is the reaſon of his being charged for neceſſaries purchaſed by her. *Manby* v. *Scott*, 1 *Lev.* 4. and *Bac. Abr. Baron and Feme*, H. where the opinion of *Hale* Ch. Baron on that caſe is ſtated at length. With reſpect to the third count the plaintiff has declared againſt *Mary Baylis* in her own right, having merely ſtyled her "adminiſtratrix as aforeſaid" but not alleged that ſhe was indebted or promiſed "*as* adminiſtratrix as aforeſaid." If therefore the other counts are againſt her in her capacity of adminiſtratrix, this is a misjoinder of action. Indeed money had and received can only be maintained againſt her in her perſonal character, *Roſe* v. *Bowler*, 1 *H. Bl.* 108. If therefore there can be judgment *de bonis teſtatoris* on the other counts, ſtill on this count the judgment muſt be *de bonis propriis*.

Vaughan Serjt. *contrà*. It is a rule that the huſband muſt be joined in all caſes where the cauſe of action would ſurvive againſt the wife. Although the plaintiff might perhaps in this caſe have declared againſt the huſband as upon a perſonal contract, yet he was at liberty to purſue his remedy againſt the wife as adminiſtratrix, and to make her a co-defendant. The only objection in *Hawkes* v. *Saunders* was, that the defendant was charged perſonally, and it ſeems to have been admitted that if the action had been brought againſt him in his repreſentative capacity, it might have been maintained. Lord *Mansfield* there ſays: "An executor who has received aſſets is under every kind of obligation to pay a legacy; he receives the money as a truſt or depoſit to the uſe of the legatee:" So here the wife having in the character of adminiſtratrix received a ſum of money which belonged to the Plaintiff, ſhe is under every kind of obligation to pay it over. The contract in this caſe had its inception in the life-time of the inteſtate, though it was not complete till after her death, and in that reſpect is not unlike the caſe of a covenant by the teſtator and a breach by the executor. The ground of action in *Rann* v. *Hughes* (*a*), 7 *Bro. Parl. Caſ.* 550. was a promiſe by the adminiſtratrix to pay the debt of her inteſtate; and it may be collected from that caſe that if the judgment had been *de bonis teſtatoris* it would have been good, but that a judgment *de bonis propriis* was not warranted by ſuch a promiſe. Admitting the third count to be bad, the Plaintiff is entitled to judgment on the two former counts: and even if it amount to a misjoinder of action, the Court will give the Plaintiff leave to amend by ſtriking out the laſt count, as in *Jennings* v. *Newman*, 4 *Term Rep.* 347; or the ſame thing may be done by entering a *nolle proſequi*; for it has lately been held that a *nolle proſequi* may be entered after demurrer joined. *Milliken* v. *Fox* (*b*).

Lord ELDON, Ch. J. The facts of this caſe are, that the Plaintiff being entitled to a certain ſum of 3 *per cent. South Sea* Annuities ſtanding in the name of *Elizabeth Stattard*, and alſo to the dividends which had accrued during her life, was deſirous of obtaining poſſeſſion of them through the medium of an adminiſtration. The conſideration for the promiſe ſtated in the declaration is, that the Plaintiff undertook to procure adminiſtration to *Mary Baylis* as next of kin, at his own expence, and alſo to procure evidence by which ſhe ſhould be enabled to receive the dividends. But this affords no conſideration for the promiſe. Though *Mary Baylis* was next of kin it does not appear that ſhe was to derive any peculiar benefit from taking out adminiſtration, and if the Plaintiff was deſirous of placing ſome perſon between himſelf and the

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(*a*) See the caſe with the opinion of the Judges at length, 7 *T. R.* 350. n. (*a.*)
(*b*) *Ante*, vol. 1. p. 157.

PARKER v. BAYLIS.

the *South Sea* Company, it is very obvious that he ought to pay all the expences attending that tranſaction. Whatever dividends had been received by the inteſtate in her life-time were part of the general funds; and with reſpect to them the Plaintiff is entitled to demand payment out of the aſſets either as a ſpecialty or ſimple contract creditor, according as he may be poſſeſſed of ſecurity or not. But the preſent action ſeeks a judgment *de bonis inteſtati*, on the receipt of a ſum of money by the Defendants after the death of the inteſtate. The queſtion is, whether *Mary Baylis*, who appears on this record rather in the character of truſtee than in any other character, (for the ſtock is not aſſets,) has ſo much relation to the inteſtate that her perſonal act of receiving this money, though as a truſtee, ſhall give a general remedy to the *ceſtuy que truſt* againſt all the aſſets of the inteſtate in common with the ſimple contract and ſpecialty creditors? Not doubting that the Plaintiff has abundance of remedies, I am of opinion that he is not entitled to charge the aſſets of the inteſtate with a demand founded on the receipt of that which never was a part of the inteſtate's eſtate.

HEATH J. It ſeems admitted, that judgment muſt be given *de bonis inteſtati* in this caſe in the firſt inſtance. But there has been no default on the part of the inteſtate. The receipt of dividends after the death of the inteſtate is the cauſe of action; and the promiſe of *Mary Baylis* is in conſequence of that receipt. This promiſe will not bind her huſband. And as the money never was aſſets for payment of debts, non-payment in this caſe cannot bind the eſtate of the deceaſed.

ROOKE J. I am of the ſame opinion.

Judgment for the Defendant.

Feb. 4th.

BISHOP *v.* YOUNG.

Debt lies by the payee againſt the maker of a promiſſory note expreſſed to be for value received.

DEBT on a promiſſory note. The firſt count of the declaration was; "For that whereas the Defendant on &c at &c made his certain note in writing commonly called a promiſſory note with his own proper hand thereunto ſubſcribed bearing date the ſame day and year aforeſaid, and then and there delivered the ſaid note to the Plaintiff, by which ſaid note the Defendant one month after date promiſed to pay to the Plaintiff or order 8*l.* value received in goods by him the Defendant, by reaſon whereof and by force of the ſtatute in that caſe made and provided the Defendant became liable to pay to the Plaintiff the ſaid ſum of money in the ſaid note mentioned whereby an action hath accrued," *&c.* There were other counts in debt for money lent, money had and received, and an account ſtated, and the common concluſion.

To the firſt count there was a ſpecial demurrer, but as the cauſe aſſigned was afterwards removed by an amendment, the caſe was now argued as upon a general demurrer.

Marſhall Serjt. in ſupport of the demurrer. The queſtion is, whether debt will lie by the payee of a promiſſory note againſt the drawer? The Court will not incline to encourage the practice of bringing debt upon ſimple contract, ſince that practice ſubjects the Defendant to ſerious inconvenience. In caſe he ſuffer judgment by default he is liable to execution for whatever ſum the Plaintiff may chuſe to lay in the declaration; and he has no other mode of preventing that execution than by pleading and going down to trial. The queſtion on this demurrer was expreſsly decided in *Welch* v. *Craig*, 8 *Mod.* 373.; 1 *Str.* 680. S. C. where the Court were clearly of opinion that no action of debt would lie on a promiſſory note.

Bayley, Serjt. *contrà.* It is a general principle that where a man enters into a contract on a ſufficient conſideration for the payment of a ſum of money, the party with whom the contract was made may maintain an action of debt thereon. On this principle it is that actions on ſimple contract or on ſpecialty equally proceed. Lord Chief Baron *Comyns* introduces his title of *Debt on Contarct* by ſaying, "Debt lies upon every expreſs contract to pay a ſum certain." *Com. Dig.* tit. *Debt* (A. 8.) And if debt cannot be maintained by the payee of a promiſſory note againſt the maker, it certainly is the only caſe of an expreſs contract where it cannot. To found the action of debt there muſt indeed be a ſufficient conſideration. In ſome caſes the conſideration muſt be averred, in others it is implied from the inſtrument itſelf. In ſimple contract, generally ſpeaking, it muſt be averred, and in that reſpect there is no diſtinction between debt and *aſſumpſit*; whether the averment be neceſſary or not, depends upon the nature of the contract, not upon the form of action. Where the contract is founded on ſpecialty the conſideration is implied; therefore in covenant for payment of a ſum certain, or in debt on bond, the conſideration need not be averred. There are certain privileges peculiar to a bill of exchange; 1ſt, although a *choſe in action* it may be aſſigned, and the aſſignee may maintain an action thereon; 2dly, though a ſimple contract, the conſideration is implied from the nature of the inſtrument.

1800.

Bishop v. Young.

ment. Even in *aſſumpſit* therefore on a bill of exchange the conſideration is never ſtated. It appears from the caſes of *Clerke* v. *Martin*, 2 *Ld. Raym.* 757, and *Potter* v. *Pearſon*, 2 *Ld. Raym.* 759, which were before the ſtatute 3 & 4 *Anne*, *c.* 9., that the only objection then made to declaring upon a promiſſory note was, that they did not imply a conſideration though bills of exchange did. Then came the ſtatute of *Anne*; the effect of which was to put promiſſory notes upon the ſame footing with bills of exchange. The caſe of *Rumball* v. *Ball*, 10 *Mod.* 38. came before the Court ſoon after the paſſing of that ſtatute. That was debt upon a promiſſory note, no objection was taken to the form of the action, and the Plaintiff was allowed to recover. And in 1 *Mod. Entr.* 312. *pl.* 13. (*a*) it is ſaid, "In an action of debt on a promiſſory note, the Defendant demurred to the declaration, and the queſtion was, whether an action of debt would lie? it was ſaid, that it would not lie againſt the indorſer, but that it would lie againſt the drawer." With reſpect to the caſe of *Welch* v. *Craig*, it is not expreſsly ſtated in either of the reports, againſt which of the parties to the note the action was brought. But it may be obſerved, that the counſel in ſupport of the demurrer inſiſted on this diſtinction, that debt would not lie againſt the indorſer though it would againſt the drawer; which ſhews that the action in that caſe was not brought againſt the maker, and affords ground to infer the prevailing opinion of the time that if it had been brought againſt him it might have been ſupported. The undertaking of the maker differs ſubſtantially from that of the indorſer; ſince the former undertakes to pay abſolutely, whereas the latter only undertakes to pay upon the default of the maker. Between the payee and the maker, there is a privity of contract: and the ground on which it was held in *Anon. Hard.* 485. that debt would not lie againſt the acceptor of a bill of exchange, was, that his contract was collateral; admitting that it would lie againſt the drawer. The caſe of *Rudder* v. *Price*, 1 *H. Bl.* 547. was debt on a promiſſory note payable by inſtallments, and the declaration was demurred to by Mr. Juſtice *Lawrence*, then at the bar, becauſe it appeared that the laſt inſtallment was not due. But neither at the bar or on the bench was it ob-

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(*a*) In the ſame page however, *pl.* 14. it is obſerved, that the words of the ſtatute of 3 *Anne* are, that the party "ſhall recover *damages*, &c. which ſhews that an action of debt will not lie, becauſe damages are never recovered in debt."—and in *pl.* 15. it is ſaid an action of debt was never known to be brought on a bill of exchange or note," though it is admitted in the ſame *placitum* that *indebitatus aſſumpſit* will lie on a note, for in ſuch caſe the plaintiff may recover in damages.

1800.
Bishop v. Young.

jected that debt was not the proper form of action, though that objection, had it been thought maintainable, would have afforded an obvious and eaſy anſwer to the Plaintiff's demand. A precedent of a declaration in debt againſt the maker of a promiſſory note is to be found in *Morgan's Vade Mecum*, 458. The practice of diſpenſing with a writ of inquiry in actions of *aſſumpſit*, both on bills and notes, ſhews that no objection can be raiſed to this form of action on the ground of the Defendant being deprived of the benefit of a writ of inquiry where judgment has gone by default.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord **Eldon** Ch. J. The queſtion in this caſe is, Whether an action of debt will lie on ſuch a promiſſory note as is ſtated in this declaration, and between ſuch parties as the Plaintiff and Defendant in this ſuit? The Defendant, by the tenor of that note, one month after date promiſed to pay to the Plaintiff, or order, 8 *l.* value received in goods by him the Defendant; and it is averred that the note ſo made was delivered to the Plaintiff, being firſt ſigned by the Defendant. This is a note, therefore, with a conſideration apparent upon the face of it, and the action of debt is brought by the payee of that note againſt the perſon who made and ſigned it; not by the indorſee againſt the maker or the indorſer. It was inſiſted for the Defendant, that under theſe circumſtances the action of debt would not lie, and ſeveral caſes were cited in ſupport of that propoſition. The caſe particularly relied upon was *Welch* v. *Craig* reported in 1 *Str.* 680. and in 8 *Mod.* 373. In the former report it is laid down generally, that before the ſtatute no action lay upon the note as a note, nor did an action of *indebitatus aſſumpſit* lie upon a bill of exchange. I ſay, that it is there laid down generally; for it is not ſtated between what parties to the bill the action is ſuppoſed to ariſe. The report then proceeds, "the only remedy given upon the note by the ſtatute is the ſame that was before on an inland bill of exchange." The inference therefore is, that debt would not lie on an inland bill of exchange. From this caſe, as reported, we are not able to collect who the perſon was that brought the action, whether the payee or the indorſee, nor againſt whom the action was brought, whether the maker or the indorſer. The doctrine is laid down without any circumſtances enabling us to make a proper application of the caſe, and the concluſion which reſults from the reaſoning

there

1800.

Bishop v. Young.

there uſed is, that an action of debt will not lie on a promiſſory note between any parties, whether there be an apparent conſideration or not. But it is impoſſible to read the report of the ſame caſe in 8 *Mod.* without perceiving that we ſhould be in great danger of applying the caſe too generally if we were to hold it as clear law, that without any exception an *indebitatus aſſumpſit* will not lie on a foreign bill, an inland bill, or a promiſſory note. In 8 *Mod.* it was argued by the counſel, that debt would not lie againſt the indorſer, but that it would lie againſt the drawer. We ſhall ſee preſently whether there is any ground in the principles of the action of debt for that diſtinction. In that very argument the reaſon given why a general *indebitatus aſſumpſit* will not lie on a promiſſory note, is, *for want of a conſideration.* The Court are ſaid to have been "clearly of opinion that no action of debt would lie on a promiſſory note declaring thereon," and they uſe theſe expreſſions, "By the cuſtom of merchants no remedy was given on foreign bills of exchange, but by action on the caſe; the ſtatute 9 & 10 *W.* 3. *c.* 17. has given the ſame remedy to inland bills, and the 3 & 4 of *Anne* to promiſſory notes; an *indebitatus aſſumpſit* will not lie on a bill of exchange." According to this report the Plaintiff had leave to diſcontinue: it is therefore impoſſible for us to obtain a ſight of the record and ſatisfy ourſelves, whether the action was brought by the payee againſt the maker, or by any other perſon ſtanding in any other relation, or whether there was any apparent conſideration on the face of the note. But it is obſervable, on the two reports taken together, that the reaſon for holding that debt would not lie, was founded on the analogy of promiſſory notes to inland and foreign bills of exchange. If, therefore, it be true that an action of debt brought by the payee of an inland or foreign bill of exchange againſt the drawer of ſuch bill, will lie, it will remain to be conſidered whether the analogy will not require us to hold in the caſe of a promiſſory note having an apparent conſideration, that an action of debt will lie if brought by the payee of ſuch note againſt the maker. The caſe in *Hardres* ſeems to open the principles on which this caſe muſt be decided. The effect of that caſe, and of *Pearſon* v. *Garret*, *Skin.* 398. are very accurately expreſſed in *Com. Dig.* tit. *Debt.* (B). Lord Chief Baron *Comyns* after having ſaid that debt lies upon every expreſs contract to pay a ſum certain (*a*), and alſo, that it lies, though there be only an implied contract (*b*), thus

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(*a*) Tit. *Debt* (A. 8.) (*b*) Tit. *Debt* (A. 9.)

thus ſtates the principles of theſe caſes: "So debt does not lie upon a bill of exchange againſt the acceptor; for the acceptance binds him by the cuſtom of merchants, but does not raiſe a duty, *R. Hard.* 485. So it does not lie upon a note to pay, without conſideration; though alleged that it binds by cuſtom, *R. Skinn.* 398." The caſe in *Hardres* was debt againſt the acceptor of a bill; and the Court in declaring their opinion, that the action will not lie, ſay, "The acceptance does not create a duty, no more than a promiſe made by a ſtranger to pay, &c. if the creditor will forbear his debt. And he that drew the bill continues debtor notwithſtanding the acceptance, which makes the acceptor liable to pay it." As the reaſoning, therefore, ſtated in this caſe againſt the liability of the acceptor in an action of debt, is this, namely, that his ſituation is analogous to that of a perſon who takes upon himſelf an obligation to pay that which is not his debt, but the debt of another, it is clear, that the Court conſidered the drawer himſelf as owing the debt or duty, though no debt or duty were raiſed againſt the acceptor. Looking at the effect of a bill of exchange, it ſeems very reaſonable to hold, that although the acceptor be primarily liable, yet that he is not liable for his own debt, but for that of another. The drawer owes the debt; and if the drawee refuſe to accept, an action may be immediately brought againſt the drawer (*a*). If the drawer does accept, the tranſaction amounts to no more than an undertaking on his part to pay the debt of the drawer, and on the part of the holder to reſort to the acceptor, to be paid out of the effects of the drawer in his hands, before he reſorts to the drawer himſelf. With reſpect to promiſſory notes the books ſay, that when they are indorſed by the payee, they reſemble bills of exchange. But this is rather inaccurate with reference to the caſe before us. For though the payee, by making himſelf an indorſer, aſſumes the character of drawer, and the maker aſſumes that of an acceptor to certain purpoſes, yet with reſpect to the queſtion, Who owes the debt? where there is an apparent conſideration, the perſon who owes the debt is ſtill the maker of the note, as well as the drawer of the bill of exchange. Here, therefore, Lord *Coke*'s maxim may very properly be applied *nullum ſimile eſt idem*. Agreeable to this is *Hard*'s caſe, *Salk.* 23. where it is ſaid that *indebitatus aſſumpſit* will not lie againſt the acceptor of a bill of exchange, for his acceptance is but a collateral engagement, but that it will lie againſt the drawer, for he is really a debtor by the

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(*a*) *Macarty* v. *Brown*, 2 *Str.* 949. 3 *Wilſ.* 17. S. C. *Bright* v. *Purrier*, *Bull. N. P.* 269. *Milford* v. *Mayor*, *Doug.* 54. *Stedman* v. *Gooch*, *Eſp. N. P. Caſ.* 5.

receipt of the money. So alſo in *Hodges* v. *Steward*, *Skinn.* 346. it is allowed by the Court that debt will lie againſt the drawer of a bill of exchange for value received; and the reaſon given is, "but this is for the apparent conſideration." Now, in point of fact, has not this principle been applied to promiſſory notes where there has been an apparent conſideration? In *Rumball* v. *Ball* the Plaintiff was allowed to recover in debt on a note which from its tenor was clearly a promiſſory note within the ſtatute. Indeed, if it be true that an action of debt will lie againſt the drawer of a bill of exchange in favour of the payee, it ſeems to me to be the neceſſary effect of the ſtatute of *Anne*, which puts notes on the ſame footing with bills of exchange, that debt may be maintained by the payee of a promiſſory note againſt the maker. That ſtatute makes a diſtinction between the remedies which it gives to the payees and the indorſees: it enacts, that the payee may maintain an action upon the note in the ſame manner as he might do upon any inland bill of exchange againſt the perſon who ſigned the ſame, and that the indorſee may maintain his action either againſt the perſon who ſigns ſuch note or againſt any of the perſons who indorſe the ſame, in like manner as in caſes of inland bills of exchange. If, therefore, he to whom a bill of exchange for value expreſſed is made payable, may bring an action of debt againſt the perſon who ſigned it, it follows from the very words of the ſtatute, that he to whom a promiſſory note, having an apparent conſideration, is made payable, may have the ſame remedy of debt againſt the perſon who ſigned ſuch note. I take no further notice of the caſe of *Rudder* v. *Price* than to obſerve, that though it was argued for the Defendant by a perſon of great abilities, it did not occur either to him or to the Court, to obſerve that, whether the inſtallments on the note were due or not, ſtill the form of the action was miſconceived.

Under theſe circumſtances, the Court is of opinion, that in this particular caſe the action of debt may be maintained. We do not ſay how the caſe would ſtand if the action were brought by any other perſon than he to whom the note was originally given, or againſt any other perſon than him by whom it was ſigned and made, or if the note itſelf did not expreſs a conſideration upon the face of it.

Per Curiam, Judgment for the Plaintiff.

LAING *v.* RAINE, One, *&c.*

Feb. 5th.

If *A.* agree to acknowledge an old warrant of attorney given by him "ſo as to enable *B.* to enter up judgment thereon," judgment may be entered up under a judge's order, without an affidavit of the ſubſcribing witneſs.

A RULE *niſi* having been obtained for ſetting aſide a judgment entered upon a warrant of attorney under a judge's order, upon the ground of the order having been obtained without any affidavit of the ſubſcribing witneſs to the warrant of attorney; *Shepherd* Serjt. now ſhewed cauſe and relied on an affidavit by the Plaintiff's attorney, which ſtated that the warrant of attorney was given to ſecure a ſum of money payable by inſtallments; that the deponent being under a difficulty to procure the ſubſcribing witneſs at the time when one of the inſtallments became due, applied to the Defendant himſelf, and after ſtating his difficulty, propoſed that the Defendant ſhould acknowledge the warrant of attorney "ſo as to enable the deponent, if it ſhould become neceſſary, to enter up judgment thereon," he giving the Defendant time to pay the inſtallments then due; that the Defendant agreed to this propoſal, and that the inſtallment not being paid within the time, judgment was entered up.

Williams Serjt. in ſupport of the Rule cited *Abbot and Another* v. *Plumbe*, *Doug.* 216. and inſiſted that the Defendant's acknowledgment would not avail (*a*), though he allowed, that where a Defendant agrees to admit an inſtrument, the evidence of the ſubſcribing witneſs may be diſpenſed with.

Lord ELDON Ch. J. and HEATH J. were of opinion, that upon a fair conſtruction of the affidavit it appeared that the Defendant did not ſimply acknowledge the inſtrument, but agreed that the Plaintiff ſhould act upon it as if the witneſs himſelf had been produced.

ROOKE J. ſeemed to entertain ſome doubts upon the ſubject.

Rule diſcharged.

(*a*) Recognized *per Lawrence* J. *Barnes* v. *Trompowſky*, 7 *T. R.* 267.

Feb. 5th.

The KEEPERS and GOVERNORS of the Poſſeſſions, &c. of HARROW SCHOOL *v.* ALDERTON.

In an action of waſte on the ſtatute of *Glouceſter* againſt tenant for years, for converting three cloſes of meadow into garden ground, if the jury give only one farthing damages for each cloſe, the Court will give the Defendant leave to enter up judgment for himſelf.

THIS was an action of waſte on the ſtatute of *Glouceſter*, for ploughing up three cloſes of meadow land, and converting the ſame into garden ground, and building thereupon, to the damage of the Plaintiffs of 500 *l.* Plea, Not guilty (*a*).

The cauſe was tried before *Heath* J. at the *Weſtminſter* ſittings after laſt *Trinity* Term, when the jury found a verdict for the Plaintiff with three farthings damages, being one farthing for each cloſe.

In the *Michaelmas* Term following, *Cockell* Serjt. obtained a Rule, calling on the Plaintiff to ſhew cauſe why the judgment ſhould not be entered up for the Defendant, on account of the ſmallneſs of the damages recovered, on the principle that *de minimis non curat lex*; and cited in ſupport of the application *Bro. Abr.* tit. *Waſte*, pl. 123. *Co. Lit.* 54. *a.* 2 *Inſt.* 306. *Cro. Car.* 414. 452. *Finch's Law*, *lib.* 1. *cap.* 3. *ſ.* 34. adopted 3 *Black. Com.* 228. *Vin. Abr.* tit. *Waſte* N. and *Buller's N. P.* 120.

Shepherd Serjt. now ſhewed cauſe. There are two ſpecies of waſte, that which conſiſts in the abuſe of the thing in which the waſte is committed, and the conſequent deterioration of its value; and that which changes the nature of the thing itſelf. In waſte of the firſt kind, if the damage be very ſmall, it may be right that no action ſhould lie, becauſe the deterioration is the eſſence of the waſte. But where the waſte conſiſts in the alteration of the property, that alteration is the eſſence of the waſte. If then the amount of pecuniary damage be the criterion of this kind of waſte alſo, the diſtinction will no longer exiſt; for it will then be the deterioration of value, and not the alteration of the property which will conſtitute the waſte. It is clear that "if the tenant convert arable land into wood, or *è converſo*, or meadow into arable, it is; for it changeth not only the courſe of his huſbandry, but the evidence of his property." *Co. Lit.* 53. *b.* though it be for the advantage of the leſſor, *Dyer*, 35. *b.* *Hob.* 234. 2 *Leon.* 174. *per Periam* J. and *Owen*, 67. All the caſes in which the Rule contended for has prevailed, have been caſes of deterioration of property; and though the Court will not allow the judgment to be entered for

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(*a*) For precedents of pleadings in this action, ſee *Co. Ent.* tit. *Waſte* & *Reſt. Ent.* ſame title.

the Plaintiff where the damages in ſuch a caſe are ſmall, yet though the damages be ſmall in this caſe, where the nature of the property itſelf has been changed, they will not deprive the Plaintiffs of a judgment by which they are entitled to recover the land (*a*). The obſervation of *Bracton*, *lib.* 4. *c.* 18. *ſ.* 12. *fol.* 316. *b.* that *vaſtum erit injurioſum niſi vaſtum ita modicum fuerit, propter quod non ſit inquiſitio facienda* ſeems to be confined to caſes of deterioration; for he is there only ſpeaking of the tenant, who in taking *eſtovers ſi menſuram excedat utendo et capiendo ultra rationabile eſtoverium ſuum, utitur quaſi in alieno.* It is alſo to be obſerved, that where waſte is found to have been committed in ſeveral places, the Plaintiff is entitled to recover the thing waſted, notwithſtanding the ſmallneſs of the damages, 14 *H.* 4. 11. *b.* *Bro. Abr.* tit. *Waſte*, pl. 70.

Lord **Eldon** Ch. J. I confeſs, that when this application was firſt made, I was not aware, that under the circumſtances of the caſe the Defendant was entitled to demand judgment: but my Brother *Heath* has ſatisfied me that the application is ſupported by the current of authorities. I do not indeed ſee preciſely on what ground thoſe deciſions have proceeded; though I can eaſily conceive many caſes in which it may be extremely unconſcientious for a Plaintiff to take advantage of his judgment, where ſuch ſmall damages have been recovered as in this caſe. As, if the owner of land ſuffer his tenant to lay out money upon the premiſes, and then bring an action of waſte to recover poſſeſſion when the land may have been improved to ten times the original value. The caſes do not appear to authorize the diſtinction contended for by my Brother *Shepherd.* Whether the waſte committed be by alteration of the property, or by deterioration, ſtill the jury, in eſtimating the damages, take into conſideration the injury which the Plaintiff has ſuſtained; and in this caſe the jury have eſtimated the damage which theſe Plaintiffs have ſuſtained, by the alteration of their

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(*a*) By the ſtatute of *Glouceſter*, 6 *Ed.* 1. *c.* 5. if tenant for life or years do waſte, he ſhall forfeit the place waſted, and treble damages; if a guardian, he ſhall forfeit his wardſhip, and ſhall render damages to the heir if the wardſhip forfeited be not ſufficient to ſatisfy the damages. In *Hil.* 34 *Ed.* 3. an infant having brought waſte againſt his guardian, damages were found to the value of twenty-one pence; and it was contended, that for the ſmallneſs of the value it ſhould not be adjudged waſte. The Court upon great conſideration awarded "that the Plaintiff ſhould recover the wardſhip, &c. without damages, becauſe the wardſhip was worth more than the damages of the place waſted." *Fitz. Abr. Waſte*, pl. 146. It does not, however, neceſſarily follow from this caſe, that where ſmall damages are found againſt tenant for life or years, the Plaintiff ſhall recover the *place waſted*, without damages; and indeed it was laid down ſo early as *Paſch.* 8 *Ed.* 2. that in ſuch caſe the Court can never award one without the other, *Fitz. Abr. Waſte*, pl. 111.

1800.

The GOVERNORS, &c. of HARROW SCHOOL *v.* ALDERTON.

property, at three farthings only. The Courts of Common Law ſeem to have entertained a ſort of equitable juriſdiction in caſes of this kind.

HEATH J. This doctrine prevailed as early as the time of *Bracton*, who wrote before the ſtatute of *Glouceſter*. With reſpect to the diſtinction taken, there is no reaſon why pecuniary damages ſhould not be aſſeſſed for the alteration of property as well as for the deterioration. Thus, if a tenant convert a furze-brake in which game have bred into arable or paſture, by which its real value would be improved, but its value to the landlord depreciated, it would be the buſineſs of the jury to aſſeſs damages to the landlord thereon.

ROOKE J. I am of the ſame opinion.

Rule abſolute.

Feb. 5th.

Ex parte EVAN EVANS.

If by abuſe of the proceſs of one of the Courts at *Weſtminſter* a ſheriff's officer extort a promiſſory note from a ſuitor, and then declare upon that note in another of the Courts at *Weſtminſter*, the latter Court cannot interfere ſummarily to puniſh the officer under 32 *Geo.* 2. *c.* 28. *ſ.* 11.

THIS was an application under the Lord's act 32 *Geo.* 2. *c.* 28. *ſ.* 11. (*a*) for an order to puniſh two ſheriff's officers for extortion, and to ſtay their proceedings in an action againſt the petitioner, with coſts. By the affidavit on which the application was founded, it appeared that the petitioner having ſued proceſs of *quo minus* out of the Court of *Exchequer*, applied to one of theſe officers to arreſt a perſon in *Oxfordſhire*, and propoſed to give him ten guineas if he ſhould ſucceed in making the arreſt, but nothing in caſe he ſhould fail; that the other officer, who was the principal, refuſed this propoſal, but inſiſted on, and had his regular fee of one guinea; that the two officers then effected the arreſt, and having ſo done, demanded the ten guineas which had been offered in the manner above-mentioned, and obliged the petitioner to give them his note for that ſum; that on this note the petitioner was ſued in the Mayor's Court at *Oxford*, but the proceedings there were afterwards ſtayed, on the petitioner giving the officers a new note for the

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(*a*) By that ſection, "for the more "ſpeedy puniſhing gaolers, bailiffs and "others, employed in the execution of pro"ceſs for extortion and other abuſes in "their reſpective offices and places," upon the petition of any perſon arreſted by any proceſs, complaining of exaction or extortion by any gaoler, &c. "unto any of his "Majeſty's Courts of Record at *Weſtminſter* "from whence the proceſs iſſued by which "any perſon who ſhall ſo petition was ar"reſted, or under whoſe power or juriſ"diction any ſuch gaol, priſon, or place is" ſuch Court is authorized "to hear and "determine the ſame in a ſummary way, "and to make ſuch order thereupon "for redreſſing the abuſes, which ſhall "by any ſuch petition be complained "of, and for puniſhing ſuch officer or per"ſon complained againſt, and for making "reparation to the party or parties injured, "as they ſhall think juſt, together with the "full coſts of every ſuch complaint."

above ſum, and that on this laſt note an action was commenced in this Court.

Williams Serjt. moved this on the ground of its being an abuſe of the proceſs of this Court, and within the proviſions of 32 *Geo.* 2. *c.* 28. *ſ.* 11.

Sellon Serjt. ſhewed cauſe againſt the Rule *Niſi*, and inſiſted that the Court had no authority to interfere in the way deſired, inaſmuch as, if an abuſe of any proceſs had taken place, it was an abuſe of the proceſs of the Court of *Exchequer*.

Lord **ELDON** Ch. J. on this day ſaid, We have looked into the act of parliament, and are ſatisfied that we have no juriſdiction in this caſe. The ſummary power of interference is given to the Court from whence the proceſs iſſues; we therefore can take no notice of this application.

Per Curiam, Rule diſcharged.

ILES and Others *v.* BOXALL.

Feb. 5th.

A bond taken by the commiſſioners, appointed under an incloſure act, to indemnify themſelves againſt the expences of a ſuit brought to try the right to an allotment made by them, and in which they are, according to the directions of the act, made Defendants, is not void; though there be a fund provided out of which ſuch expences may in *ſome caſes* be ſatisfied; at leaſt if the commiſſioners doubt whether the caſe in queſtion be one of thoſe caſes.

DEBT on bond.

On *oyer* craved by the defendant it appeared from the recital of the condition that by an act of parliament of the 37 of *Geo.* 3. for dividing, allotting and encloſing the open and common fields, *&c.* in the pariſh of *Croydon* in *Surry*, the Plaintiffs who were appointed commiſſioners, were directed "to make an allotment of land to the perſon or perſons entitled to the rectorial tithes of commons and waſtes within the ſaid pariſh in lieu of ſuch tithes;" that it was alſo provided by the ſaid act that thoſe whoſe claims ſhould not be allowed by the commiſſioners, and any three or more whoſe claims ſhould be allowed by the commiſſioners but who ſhould object to the allowance of the claims of other perſons, might proceed to trial of his or their claims at the aſſizes for the county in a feigned cauſe to be carried on between the perſons claiming and any one of the commiſſioners diſallowing their claims, or the perſons objecting to the allowance of ſuch claims; that the Defendant claimed to be entitled to the rectorial tithes of the ſaid commons and waſtes, and his claim was allowed; that other perſons having alſo claimed to be entitled to certain proportions of the ſame tithes, and having objected to the determination of the commiſſioners reſpecting the Defendant's claim, reſolved to proceed to trial, and delivered iſſues accordingly, that "although the ſaid Plaintiffs were

ILES *v.* BOXALL.

enabled by the ſaid act to reimburſe themſelves the coſts of actions brought againſt them as therein is expreſſed, yet as they conſidered the queſtion reſpecting the ſaid tithes not to be of that public nature which would authorize them to defend the actions concerning the ſame at the public charge," they required the defendant to indemnify them from all expences attending the ſame, and which he agreed to do, and for that purpoſe entered into the bond; the condition of which was to indemnify the Plaintiffs from thoſe expences.

The Defendant pleaded; 1ſt, *non eſt factum*; 2dly, the act of parliament authorizing the commiſſioners to ſet out an allotment by way of compenſation to the owners of rectorial tithes in the firſt place, and then to divide the reſt of the lands among the perſons entitled thereto, the material clauſe of which, after directing that the claims of the different perſons concerned in the diviſion and allotment, in caſe of the determination of the commiſſioners being diſputed, ſhould be ſettled in manner before ſtated in the recital of the condition, provided, that in order to raiſe a ſufficient ſum of money to defray the charges and expences of obtaining and paſſing the act, and of carrying it into execution "and of defending any action or actions which might be brought againſt the ſaid commiſſioners or any of them, and all other the charges and expences ariſing and accruing in the carrying the ſaid act into execution," it ſhould be lawful for the commiſſioners "to make ſale by auction of ſuch part or parts of the ſaid commons, marſhes, heaths, waſtes, and commonable woods, lands and grounds, as they ſhould deem ſufficient for the purpoſes aforeſaid." The plea then went on to ſtate that the Defendant, in purſuance of the ſaid act, did deliver to the commiſſioners a claim in writing to the rectorial tithes of all the commons, &c. within the ſaid pariſh of *Croydon*, which was allowed by them; that certain other perſons afterwards claimed to be entitled to certain proportions of the ſame tithes, which claims were diſallowed by the commiſſioners; that thereupon afterwards and before the making of the ſaid writing obligatory three ſeveral feigned actions were brought againſt one of the commiſſioners, and which ſaid actions at the time of making the ſaid writing obligatory were reſpectively depending in the Court of *King's Bench*, and the ſeveral plaintiffs reſpectively intended to proceed to the trial of their reſpective claims at the next aſſizes for the county of *Surry*, of all which ſaid ſeveral premiſes the Plaintiffs, ſo being ſuch commiſſioners as aforeſaid, had notice. "And thereupon afterwards whilſt the ſaid actions were ſo depending as aforeſaid, and before the trial thereof, to wit, on, *&c.* at, *&c.* the ſaid Plaintiffs, under colour of their office as ſuch commiſſioners, did unlawfully and unjuſtly exact and require of and from the ſaid Defendant the ſaid writing obligatory in the ſaid declaration mentioned, with the ſaid condition thereunder written. And the ſaid J. F. (the commiſſioner made Defendant in the ſaid ſuit) did then and there refuſe to proceed in the defence of the ſaid actions unleſs the Defendant would make and enter into ſuch writing obligatory as aforeſaid; and thereupon the ſaid Defendant, in order that the ſaid J. F. might proceed in the defence of the ſaid actions, did then and there make and enter into the ſaid writing obligatory in the ſaid declaration mentioned with the ſaid condition thereunder written: which ſaid writing obligatory for the cauſe aforeſaid was and is wholly void in law. And this he is ready to verify. Wherefore he prays judgment if he ought to be charged with the ſaid debt by virtue of the ſaid writing obligatory, with this, that the Defendant will alſo verify that the means provided by the ſaid act were and are ſufficient to enable the ſaid commiſſioners to defray the coſts of defending the ſaid actions, and all other the coſts charges and expences ariſing and accruing in carrying the ſaid act into execution, *&c.*"

The Plaintiffs in their replication tendered iſſue on the firſt plea, and demurred generally to the ſecond. The Defendant joined in iſſue and demurrer.

Beſt Serjt. in ſupport of the demurrer obſerved that the queſtion was, Whether the commiſſioners were juſtified in taking this indemnity bond? He was proceeding to argue that the only ground on which the plea could be maintained was, that the bond had been obtained by dureſs; but that dureſs in law is ſuch a reſtraint as deprives a man of the power of acting for himſelf, not ſuch a reſtraint as merely affects his intereſt (*a*): and if it was to be contended that the bond was obtained by fraud, that the Defendant muſt ſeek relief in a Court of Equity. He was then ſtopped by the Court.

Palmer Serjt. *contrà.* It is a principle of law that no public officer can carve out to himſelf an advantage in his official ca-

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(*a*) *Vide* 2 *Inſt.* 483. and 1 *Bl. Com.* 130. 131. but Lord Chief Baron *Comyns*, in his *Digeſt*, tit. *Officer*, (H.) in treating of exaction by an officer, cites 3 *Inſt.* 149. to ſhew that any bond exacted from the ſubject to the King or other perſon, to do that which by law he is bound to do to the King, is void, and then adds "and the defendant ſhall pead *dures*;" this latter poſition, however, is not ſupported by 3 *Inſt.* 149. to which he refers generally for the whole ſentence.

pacity. *Empſon* v. *Bathurſt*, *Hut.* 52. (*a*). That caſe does not proceed on the principle of dureſs, but that the bond taken by the ſheriff being extorſive was void at common law. Now a perſon acting under a judicial authority, delegated to him by act of parliament, is under as great an obligation to do his duty as an officer who derives his authority from the common law. The commiſſioners have no option, but muſt join the iſſue when tendered to them, and defend it when joined. If it were not ſo, many of the claimants who are poor, and whoſe rights are ſmall, might be deprived of them altogether in conſequence of the expence attending the litigation. The commiſſioners have no more right to demand a bond before they join iſſue than an under-ſheriff has to demand his fees before he executes proceſs; which he cannot do. *Heſcott's* caſe, 1 *Salk.* 330.

Lord Eldon Ch. J. The commiſſioners have a right to ſay, " we are doubtful whether under the proviſions of this act we can in this particular caſe be re-imburſed the expences of the ſuit out of the fund provided by the act: either compel us to defend the iſſue by obtaining a *mandamus* from the Court of *King's Bench*, or give a bond to indemnify us againſt the expences which we may incur." If the Defendant pays the expences of the ſuit according to the condition of his bond, he will then be entitled to ſtand in the place of the commiſſioners, and may compel them to re-imburſe him by a ſale of land, if they would have been warranted in ſo re-imburſing themſelves. If they would not have been warranted in ſo re-imburſing themſelves, the Defendant is the proper perſon to pay the expences of the ſuit. I cannot but entertain a doubt upon this act. The property which was the ſubject of the act conſiſted of lands and tithes. The commiſſioners are directed to ſet out certain allotments in lieu of tithes, and then to divide the reſt among the land-owners. When they have ſatisfied all the demands of the tithe-owners, by ſetting out for them their due proportion of land, it appears to me that any queſtion ariſing among the tithe-owners, as to their reſpective rights to the land given in lieu of tithes, muſt be litigated at their own expence. The act ſeems to ſever the conſideration of the tithes and of the land. Can it be contended, that if ſeveral claim to be entitled to the tithes, and the land-owners admit the lands to be ſubject to tithes, that the latter are to pay the expences of a

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(*a*) *Winch. Rep.* 20. 50. *Winch. Entr.* 334. S. C. alſo cited *Poph.* 176.

litigation among the former, in which they have no intereſt? It may as well be ſaid that if a diſpute ſhould ariſe among the land-owners they would be entitled to have the expences of ſuch diſpute defrayed out of the allotments in lieu of tithes.

Per Curiam, Judgment for the Plaintiffs.

(In the EXCHEQUER CHAMBER).

H. BEARD and ARABELLA his Wiſe *v.* WEBB and Another; in Error.

Feb. 5th.

A *feme-covert* ſole trader in the city of *London*, is not liable to be ſued as ſuch in the courts at *Weſtminſter*: And even in the city courts the huſband ſhould be joined for conformity.

THE record in this caſe, after ſtating in the uſual form the appointment of attornies by the Plaintiffs below, (the Defendants in error,) and alſo by *Arabella Beard* the ſole Defendant below, (and one of the Plaintiffs in error,) proceeded to ſet out a declaration by bill in the *King's Bench* againſt the latter for goods ſold and delivered, money paid, lent, had and received, and on an account ſtated. To this the pleas were; 1ſt, *Non aſſumpſit*; 2dly, that the Defendant was *covert* of one *H. Beard*; 3dly, a ſet-off. The replication took iſſue on the firſt plea, and anſwered to the ſecond, "that although true it is that ſhe the ſaid *Arabella* before and at the time of the making of the ſaid ſeveral promiſes and undertakings in the ſaid declaration mentioned, and each of them, was, and yet is the wife of, and married to the ſaid *H. Beard*, as the ſaid *Arabella* hath in her ſaid plea, ſecondly, above pleaded in bar, alleged; yet for replication in this behalf the Plaintiffs ſay that the city of *London* is an ancient city, within which ſaid city there is and from time whereof, &c. there hath been a cuſtom uſed and approved of; that is to ſay, that where a *feme-covert* of a huſband uſeth any craft in the ſaid city on her ſole account whereof her huſband meddleth nothing, ſuch a woman ſhall be charged as *feme-ſole*, concerning every thing that toucheth her craft; and that the ſaid *Arabella* before, and at the time of the making of the ſaid ſeveral promiſes and undertakings of the ſaid *Arabella* in the ſaid declaration mentioned, uſed the craft of an upholſterer in the ſaid city, on her ſole account, whereof the ſaid *H. Beard* during all the time aforeſaid meddled nothing within the ſaid city of *London*, to wit, at, &c. and that the ſaid goods, &c. were ſold and delivered by the ſaid Plaintiffs to her the ſaid *Arabella*, the wife of the ſaid *H. Beard*, as uſing the craft aforeſaid, within the ſaid city, on her ſole account as aforeſaid." There were ſimilar averments reſpecting the money paid, lent, had and received, and account ſtated. On the plea of ſet-off iſſue was tendered. The rejoinder, after proteſting that there was no ſuch cuſtom as that mentioned in the replication, tendered iſſue on the Plaintiffs' averment that ſhe carried on the trade of an upholſterer on her ſole account, and joined iſſue on the ſet-off. The rebutter was a joinder in the iſſue tendered by the rejoinder. Upon the trial of theſe iſſues the jury found, as to the firſt, that the ſaid *Arabella* did undertake, *&c.* As to the ſecond, that ſhe did "uſe the craft of an upholſterer in the city of *London* within mentioned, according to the cuſtom of the ſaid city, on her ſole account, whereof her huſband the within-named *H. Beard* meddled nothing;" and as to the third, that the Defendant had no ſet-off. On this finding judgment was entered up for the Plaintiffs in the *King's Bench*.

Arabella Beard, (the Defendant below,) together with her huſband *H. Beard*, having brought a writ of error in this court aſſigned for errors, that the Plaintiffs below "declared againſt her the ſaid *Arabella* as a *feme-ſole* in the court of our ſaid Lord the King before the King himſelf, whereas by the law of the land no ſuch action could or can be ſupported againſt the ſaid *Arabella* in the ſaid court; and alſo that the ſaid *Arabella* appeared in the ſaid ſuit and pleaded by *T. W.* her attorney, whereas by the law of the land the ſaid *Arabella* could not during her coverture make an attorney in the ſaid court without the ſaid *H. Beard* her ſaid huſband; and alſo, that the ſaid *H. Beard* ſhould have been joined in, and made a party to, the ſaid ſuit." Joinder in error.

Wigley for the Plaintiffs in error. It is a ſettled principle that a *feme-covert* ſole trader cannot be ſued upon the cuſtom of the city of *London* anywhere but in the city courts, becauſe that is a cuſtom regulating the proceedings of thoſe courts. Upon this *Stanton*'s caſe, *Moor*, 135. and *Bohun*, *Privil. Lond.* p. 83. are expreſs; and in the firſt of theſe books *Fenner* cited 1 *Ed.* 4. in ſupport of this doctrine. At the end of the report in *Moor* there is another caſe reſpecting a cuſtom of the city of *London*, where *Fleetwood* Serjt. and Recorder of *London*, on moving for a *procedendo*, ſaid, that the "*Common Pleas* could not do right upon the ſaid cuſtom," and therefore it was granted him. So in *Langham* v. *la Femme de John Bewett*, *Cro. Car.* 68. a return to a *habeas corpus cum cauſâ* to remove a cauſe from the city court being that the wife was ſued as a *feme-ſole* merchant, *Hutton*, *Harvey*, and *Croke*, Js. were of opinion "that it was ſuch an action and cauſe wherewith this Court (C. B.) ought not to meddle nor take conuzance, "nor can give the party relief although he hath good cauſe of "ſuit; for in *London* they are judges of their own cuſtoms, and "by intendment will proceed in their courts there according to "their cuſtoms and not otherwiſe, and therefore we ought not to "take away their privileges, nor remove the action out of that "court where we cannot give remedy in this." The ſame law is laid down by Lord *Manſfield* and *Yates* J. in *Lavie* v. *Philips*, 3 *Bur.* 1776. 1 *Bl.* 570. S. C. and agrees with *Offley* v. *Johnſon*, 2 *Leon.* 166. This was again acted upon in *Pope* v. *Vaux and Wife*, 2 *Bl.* 1060. The moſt modern recognition of this law is to be found in *Cawdell* v. *Shaw*, 4 *Term Rep.* 361. and in the caſe of *Reade* v. *Frances Jewſon*, there cited by *Buller* J. The caſe of *Moreton* v. *Packman et Uxor*, 2 *Keb.* 583. 1 *Mod.* 26. S. C. ſhews, that though the cuſtom be admitted upon the record, yet the courts at *Weſtminſter* cannot try whether the trade be within the cuſtom or not. In the preſent caſe therefore the jury have found that which is not a ſubject of inquiry in the court in which they found it. It is alſo obſervable, that in all the caſes cited it is ſaid that the huſband ought to be joined for conformity; and *Dyer*, 271. *b.* is mentioned by *Aſton* J. 4 *Term Rep.* 364. as a ſingular inſtance of the wife being ſuffered to appear alone to prevent her being waved, the huſband being baniſhed (*a*). This being a caſe where the wife is liable to execution, and where the huſband may therefore be deprived of her fellowſhip, the latter has acted right in joining in this writ of error. *Hayward* v. *Williams*, *Sty.* 254. 280. *Earl of Bedford*'s caſe, 7 *Co.* 8. and *Hob.* 225. (*b*)

Wood for the Defendants in error. This caſe differs from thoſe cited, inaſmuch as the cuſtom being here ſtated on the record and admitted, the Court is not called upon to take judicial notice of it. Indeed, the only caſe in which the cuſtom appeared upon the record is *Stanton*'s caſe; and there it was held that the action might be maintained in the courts above. It is true, that if a party would

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(*a*) There are two caſes on this ſubject in *Dyer*, 271. *b.* one in the text and one in the margin, neither of which, however, exactly correſponds with the deſcription ſuppoſed to be given by *Aſton* J. in 4 *Term Rep.* 364. The former was debt on bond againſt huſband and wife; in which proceſs was continued until the huſband was outlawed and the wife waved; the wife being then brought in by proceſs, ſhewed the Queen's pardon, and the Court held that ſhe ſhould be diſcharged from the impriſonment, but that the pardon could not be allowed, ſince the wife alone could not ſue a *ſcire facias* to compel the Plaintiff to declare; and the pardon had a condition, *ita quod ipſa ſtaret recta in curiâ*, which ſhe could not do without her huſband. In the latter caſe proceſs in debt againſt huſband and wife having been continued to the exigent, the huſband appeared, but would not ſuffer his wife to appear, and it was ruled that the wife might make an attorney to prevent her being waved.

(*b*) *Vide etiam* 18 *Ed.* 4. 4. and *Edwards* v. *Simpſon*, 1 *Roll. Abr.* 748. pl. 18.

proceed by foreign attachment, he can only avail himſelf of that remedy in the city courts (*a*). But the cuſtom ſtated in this caſe is very ſtrong in its nature, and is, as was ſaid of the cuſtom of apprenticeſhip in *Stanton*'s caſe, pleadable everywhere. The words of the cuſtom are, that ſhe ſhall be "charged as a *feme-ſole* in every thing touching her craft;" the meaning of which is, that ſhe ſhall be charged, not in the city of *London* only, but all the kingdom over. Great miſchief might enſue if this were otherwiſe: for a *feme-covert* ſole trader, after having incurred a debt in *London*, might quit that city and ſo defraud her creditors. In 1 *Ed*. 4. 6. *Billing* having aſſerted that by the cuſtom a *feme* might be ſued in the ſuperior courts without joining her baron, *Littleton* cited a caſe to the contrary; but it is added, that in the caſe cited the cuſtom of *London* was not alleged; *et ideo, quære*. [*Chambre* Baron; In 1 *Ed*. 4. 6. *Danby* J. obſerves, that when an action is brought on a cuſtom, which cuſtom lies in the conuzance and allowance of a particular juriſdiction, the action on the cuſtom is not maintainable in the ſuperior court.] Moſt of the caſes cited for the Plaintiffs in error were on motion for *procedendo*; in which caſes the cuſtom could not have appeared upon the record: for in declarations in the city court the cuſtom is never averred; but the judges there take notice of the cuſtom judicially, as the judges of the courts at *Weſtminſter* do of the common law. In *Royſton* v. *Ivory*, 3 *Keb*. 302. (*b*) a *procedendo* was awarded on the ſuit of a *feme-covert* ſole merchant; and the Court of *King's Bench* there ſaid they muſt be aſcertained of their juriſdiction, but if the cuſtom be alleged in the declaration it is ſufficient. The meaning of this ſeems to be, that if the cuſtom appear to the Court above, that Court will entertain the cauſe, and that if the cuſtom had been alleged in in that caſe a *procedendo* would not have been granted. Neither in *Caudell* v. *Shaw* or in *Read* v. *Jewſon* was any cuſtom alleged. With reſpect to the ſecond objection, that the huſband ought to have been joined, it may be aſked, how the action can be brought againſt the huſband and wife, if the latter only is to be liable? If

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(*a*) To this effect ſee *Turbill*'s caſe, 1 *Saund*. 67. *Gilb. Hiſt. C. B.* p. 209. *ed*. 2. And this doctrine has lately been recognized in *Ridge* v. *Hardcaſtle*, 8 *Term Rep*. 417. though ſome authorities, *Dyer*, 287. *a*. and *Lodge*'s caſe, 2 *Leon*. 156. were there alluded to as being the other way.

(*b*) In *Bohun Privil. Lond*. p. 188. and in *Caudell* v. *Shaw*, 4 *Term Rep*. 362. *arguendo* the cuſtom is ſaid to have been alleged in the declaration. The report in *Keble* is very confuſed, but the reſult of it ſeems to be, that the cuſtom was alleged in the declaration below, but was not returned upon the writ by which the action was removed; that the Court doubted whether they could award a *procedendo* without ſuch return, ſince it did not appear whether the Court below had juriſdiction; but that finding the cuſtom alleged in the declaration they did award it.

the judgment were againſt both, the execution might go againſt both.

Cur. adv. vult.

Lord ELDON Ch. J. (after ſtating the record) now delivered the judgment of the Court.—Suppoſing the jury were competent in this caſe to enter into the queſtion of the cuſtom at all, ſtill they have not carried that cuſtom farther in point of preciſion as to how, and where, and in what manner the *feme-ſole* trader is to be charged, than it was alleged in the replication. It ſtands therefore before us upon the original allegation as made by the Plaintiffs below. On this record the Court of *King's Bench* gave judgment in favour of the Plaintiffs below; and in deference to the opinion of that Court, (entertaining a contrary opinion myſelf,) I could have wiſhed to have known the grounds upon which it proceeded before we ordered a reverſal. The writ of error aſſigns for cauſes; 1ſt, That *Arabella Beard* has been ſued in the court above as a *feme-ſole*; 2dly, That ſhe had no power to make an attorney in the court where ſhe was ſued without her huſband; and 3dly, That her huſband ought to have been joined in the action for conformity. After conſidering the authorities upon this ſubject, it it is the opinion of this Court that the judgment of the Court of *King's Bench* cannot be ſupported. We are of opinion that this action on the cuſtom will not lie againſt a *feme-covert* in the courts of *Weſtminſter-hall*, though the cuſtom may in ſome inſtances be pleaded in bar there. And we think that it would be giving a greater degree of effect to the cuſtom than belongs to it, to hold that a *feme-covert* may make an attorney in *Weſtminſter-hall;* and we alſo think that ſhe cannot be ſued as a *feme-covert* ſole trader without joining her huſband at leaſt for conformity. Many caſes were cited in argument; but on giving my beſt attention to the diſtinctions made in favour of the Plaintiffs below, I was not able to perceive that any other propoſitions were attempted to be ſupported for them than that as the cuſtom appears upon this record, therefore this action may be maintained againſt the wife in the ſuperior court, and that there is no occaſion to make the huſband a party to the ſuit, as no judgment can be obtained againſt him. Now, in the firſt place, it makes no difference whether the cuſtom appear upon the record or not; and, 2dly, I do not admit that it does appear; for if the place where the wife is to be charged be part of the cuſtom, that circumſtance not being ſtated upon the record the cuſtom does not appear; and therefore,

1800.

Beard *v.* Webb; in Error.

fore, ſuppoſing the other objections to be of no avail, it appears to me that the Plaintiffs for that reaſon could not have any judgment. It is clear, I think, that if the cuſtom had appeared on the record ſuch as it really is, it would have put an end to the action altogether. The cuſtoms in the city of *London* are of different kinds; ſome are available everywhere, and others, of which this is one, are ſpoken of in the books in terms which are not very intelligible, unleſs explained by the caſes on the ſubject. Theſe latter cuſtoms are called executory cuſtoms, the expoſition of which expreſſion is, cuſtoms united to the courts of the city of *London*. They are pleadable in *London* and not elſewhere, except ſo far as they may be made uſe of in the ſuperior courts by way of bar. The following are cuſtoms of this ſpecies: an infant ſhall not wage his law on a covenant for tabling; no perſon ſhall wage his law where an alderman has ſigned the contract as a witneſs; pledges may be ſued without deed; and debt will lie againſt executors in ſimple contract. In addition to theſe is the cuſtom in queſtion, *viz.* that a *feme-covert* ſole merchant may ſue and be ſued with reference to her tranſactions in *London*. But I do not admit that ſhe can be ſued there without joining her huſband to a certain extent in the proceedings. The caſe of an infant binding himſelf apprentice by covenant under the cuſtom of the city of *London*, is allowed to be pleadable everywhere and to ſtand upon the ſame footing as the cuſtoms of *Gavelkind* and *Borough-Engliſh*. If, then, it can be made out that the cuſtom in queſtion is united to the courts of the city of *London*, it follows of courſe that this action cannot be ſupported upon it in the ſuperior courts. That it is united to the city courts, and that no action can be maintained upon it here, is clear from authorities. Even if an action could be maintained here, it could only be maintained in the ſame manner as in the city courts; and the authorities prove that no action could be maintained in the city courts unleſs the huſband be made a party to the ſuit for conformity: nor can the wife make an attorney to conduct her defence either in the city courts or in *Weſtminſter-hall*. The firſt authority to be cited reſpecting cuſtoms united to the city courts is *Offley* and *Johnſon*'s caſe, 2 *Leon.* 166. There one of two ſureties having been ſued to execution in the city court brought an action againſt his co-ſurety in the ſame court for contribution according to the cuſtom; the cauſe was removed into the *King's Bench*, and afterwards a *procedendo* was prayed; "and becauſe upon this matter no action lieth by the

“ courſe of the common law but only by cuſtom in ſuch cities the cauſe was remanded; for otherwiſe the Plaintiff ſhould be without remedy.” From theſe words it is clear that the Court did not proceed upon the ground of the cuſtom not appearing upon the record. It is manifeſt alſo from ſubſequent authorities that the propoſition which the Court meant to lay down was, that whether the cuſtom be ſtated on the declaration or not, an action will not lie upon the cuſtom in *Weſtminſter-hall*. In *Chamberlain* and *Thorpe*'s caſe, 1 *Leon.* 130. (*a*), which was debt in the *King's Bench* on a recognizance acknowledged before the Mayor of *London*, according to cuſtom, at the concluſion, *Ray* ſays, “ A more ſtrange cuſtom than this hath been allowed of here before, *ſcil.* that a *feme-covert* ſhall ſue an action alone without her huſband, for ſhe is a ſole merchant;” but this propoſition ſeems to be overſtated; for *Gawdy*, whoſe opinion, from what we know of him, is entitled to great reſpect, ſays, “ A *feme-covert* may have an action within the city, but not here.” I think it will be difficult to contend that the right to ſue and the liability to be ſued do not ſtand upon the ſame footing. Next comes *Stanton*'s caſe, *Moor*, 135. That was covenant on an indenture of apprenticeſhip: the Defendant pleaded infancy, and the Plaintiff replied the cuſtom of *London* which enables an infant to bind himſelf “ apprentice by indenture with covenants, and that he ſhall be bound by the covenants as if he were of full age at the time of the indenture;” *Fenner* for the Defendant demurred, and one cauſe of demurrer was, “ that ſuch cuſtom is ſolely in *London* and not at the common law, and therefore it is pleadable in *London* and not here;” and for this he vouched 1 *Ed.* 4. where it was held that a *feme-covert* ſole merchant is to be ſued in *London* and not elſewhere, and he enumerated ſeveral other cuſtoms pleadable only in the city courts. *Walmſley* for the Plaintiff did not deny the truth of the popoſition, but took a diverſity between the nature of the cuſtoms referred to and the one in queſtion, *viz.* that the former were things executory and united to the courts in *London*, but that the latter was become *choſe fort* and allowable in law, and ſo pleadable in every place within the realm. Now, if the Court proceeded on that diverſity, it will be impoſſible for the Plaintiffs here to argue that becauſe the indenture of apprenticeſhip bound the infant in *Weſtminſter-hall* that a *feme-covert* ſhall therefore be bound there alſo, ſince the very authority on which the argument is founded proceeds on the diſtinction between thoſe cuſtoms. At the end of the above caſe it is ſaid

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(*a*) *Cro. Eliz.* 186. S.C.

1800.

BEARD
v.
WEBB;
in Error.

that *Fleetwood* Serjeant and Recorder moved for and obtained a *procedendo* in an action on the cuſtom for contribution (which had been removed from the city court into the *Common Pleas*); "for," ſays he, "the *Common Pleas* cannot do right upon the ſaid cuſtom;" the meaning of which clearly is, that an action grounded on a cuſtom united to the courts in *London* does not lie in the courts in *Weſtminſter-hall*, and I think that an authority for concluding that no declaration on that ſpecies of cuſtom can be good in the courts above. Let us now look to the 1 *Ed.* 4. 5. *b.* referred to in *Stanton*'s caſe. It was a writ of debt for tabling in *London*, and *Littleton* for the Defendant offered to wage his law; and on its being objected that it was for tabling in *London*, and that the Defendant by cuſtom could not wage his law, *Littleton* urged that cuſtoms and uſages which take effect in the court where the cuſtom or uſage is, and there begin to be of force; are only allowable in the court where they are uſed. This ſeems to be a good expoſition of the expreſſion employed in *Stanton*'s caſe, of cuſtoms *executory and united to the courts in* London. *Billing* contended that the cuſtom was allowable in the courts above, and ſaid that a *feme-covert* ſole merchant by the cuſtom of *London* ſhall have an action without her huſband, and an action ſhall be maintained againſt her alone without naming her huſband, and that ſuch cuſtom is allowable here. But *Danby* J. denies this propoſition, and ſays that all good cuſtoms are pleadable in bar here, as if there be a recovery in *London* upon the cuſtom, we allow the plea and the cuſtom; but when the Plaintiff brings his action upon a cuſtom which lies in the cognizance and allowance of a ſpecial judge, ſuch action is not maintainable here. In *Snelling* v. *Norton*, *Cro. Eliz.* 409. it was held a good plea to debt on bond brought againſt an adminiſtrator, that by the cuſtom of *London* if one citizen contract to pay money to another, and he who contracts die, his executor ſhall be chargeable as upon obligation, and that the Defendant's inteſtate had ſo contracted, and that the Defendant as adminiſtrator had been ſued on ſuch cuſtom, and having paid what had been recovered againſt him, had no further aſſets. The Court gave as the reaſon for their opinion that the cuſtom had been executed againſt the Defendant. This is in perfect conformity to what was laid down by *Danby*: for a cuſtom is executory which is united to a court, and it is executed when it has been acted upon by the court to which it is united. In *Leache*'s caſe, 16 *Jac.* (*a*),

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(*a*) The Reporters have not been able to diſcover from what book this caſe is cited.

the Court of *K. B.* ſaid, "We in this court cannot examine the truth of the cuſtom." The next caſe in point of time is *Langham* v. *le Femme de John Bewett*, *Cro. Car.* 67. *Hetl.* 9. and *Littl.* 31. It was a *habeas corpus cum cauſâ* to remove a *feme-covert* ſued in *London* into the *Common Pleas*. Upon the return the cuſtom of the city was ſtated: and though *Richardſon*, Ch. J. who had taken bail *de bene eſſe*, on it being affirmed that ſhe merchandized only for her huſband, and was therefore out of the cuſtom, and *Yelverton*, J. thought that ſhe ought to be diſcharged; yet *Hutton*, *Harvey*, and *Croke*, Juſtices, thought that "foraſmuch as the writ had returned that ſhe was ſued in *London* as a *feme-ſole* merchant according to the cuſtom of *London*, it was ſuch an action and cauſe wherewith this Court ought not to meddle nor take conuſance, nor can give the party relief although he hath good cauſe of action: for in *London* they are judges of their own cuſtoms, and by intendment will proceed in their courts there according to their cuſtoms, and not otherwiſe; and therefore we ought not to take away their privileges, nor remove the action out of their court where we cannot give remedy in this." They alſo added, that "it is reaſon to accept bail where an action cannot be grounded on that contract in this court." And the cauſe was remanded. At the concluſion of the caſe is cited *Geppings* v. *Harding*, *M.* 26 *H.* 6. *Rot.* 344: the circumſtances of that caſe are not ſtated, nor is it to be found in the year-book. Probably, however, it was an action of treſpaſs for taking the Plaintiff's goods: the Defendant ſet up a delivery by the Plaintiff's wife as a ſole merchant by way of defence, and iſſue was taken on this point, whether ſhe were a ſole merchant or not. And where the cuſtom comes collaterally in queſtion, there is no doubt that the courts both of law and equity will find the means of aſcertaining what the cuſtom is. Then came *Moreton* v. *Packman et Uxor*, 2 *Keble* 583. and 1 *Mod.* 26. where a *procedendo* being prayed becauſe the huſband was not joined in an action for ale ſold, the Court ſaid, they could not try whether ſelling ale be within the cuſtom, "nor will any action lie here againſt her alone, nor will this Court take notice of thoſe private cuſtoms." Now although this was a caſe of *procedendo*, yet the propoſition that the action would not lie here againſt the wife alone, is laid down as generally as terms can expreſs it, and includes the ſuppoſition of the cuſtom being ſtated on the record. In *Royſton* v. *Ivory*, 3 *Keb.* 302. a *procedendo* having been prayed in the caſe of a *feme-*

covert, without the cuſtom having been returned, the Court doubted whether they could remand the cauſe. With reſpect to their own juriſdiction they had no doubt, but they ſaid that they muſt be aſcertained of the juriſdiction of the Court below: however, the cuſtom being alleged on the declaration, they held that ſufficient, and awarded the *procedendo*. It is to be obſerved that the cuſtom in this caſe was alleged in the declaration, and yet the cauſe was ſent back to be tried in the city courts. So alſo in *Soan* and *Mace*, *Comb.* 42. *Holt*, in moving for a *procedendo* in an action againſt a *feme-ſole* merchant in *London*, alleged that by the cuſtom of *London* it muſt be tried there; and upon this obſervation, which is all that is material in the caſe, his motion was granted. The laſt of the older caſes to which I ſhall refer is Mrs. *Pool*'s caſe, 11 *Mod.* 253; where it was obſerved by the Court that as a *feme-covert* ſole merchant "may be ſued ſole, ſo may ſhe ſue ſole for debts owing to her within the city." But it is to be remarked that when we meet with the expreſſions of ſuing and being ſued ſole in the older books, they mean nothing more than this, that ſhe may be ſued in the manner in which a woman may be ſued who is anſwerable without her huſband: it does not therefore follow that the huſband is not to be joined for conformity. I have not found any other authority on the ſubject till we come to the more modern deciſion of *Lavie* and another, aſſignees of *Jane Cox*, v. *Phillips* and others, aſſignees of *John Cox*, 3 *Burr.* 1776, and that is a material caſe. *John Cox* having become bankrupt, his aſſignees ſeized the goods of his wife *Jane Cox*, who had carried on trade after her marriage, as a ſole merchant in *London*, and had alſo become bankrupt. The queſtion was, Whether her ſeparate effects could be applied towards the ſatisfaction of the debts of the huſband in prejudice of her ſeparate creditors? The queſtion was not, Whether the wife could be ſued in *Weſtminſter Hall* without her huſband? but it became neceſſary to examine the cuſtom collaterally, in order to determine the right to the goods in queſtion. The cuſtom is there ſtated from the *liber albus*; which alleges, that if the huſband and wife ſhall be impleaded, in ſuch caſe the wife ſhall plead as a *feme-ſole*. The cuſtom therefore ſuppoſes the huſband to be joined in the action, and I underſtand that in practice the huſband is joined as to all acts before the plea, and particularly in naming the attorney. The queſtion was argued by the late Lord Chief Juſtice *Eyre*, then Recorder of *London*, who ſeems to have had no conception that an action could be maintained in the city courts, unleſs the huſband were joined for conformity. Mr. *Dunning*, who argued on the other ſide, put the right of ſuing and the liability to be ſued as a ſole merchant upon the ſame footing, and ſtated them both to be confined to the city courts. Lord *Mansfield* ſays, "The *feme-ſole* trader in *London*, under this cuſtom, muſt indeed bring her action in *London*, but ſuch cuſtom would be allowed in any other court in a defence by the huſband." This is a clear expoſition of the language uſed by *Walmeſly* in *Stanton's* caſe, and by *Danby* in the year-book, that cuſtoms united to the city courts are executory and pleadable there only, but that ſuch cuſtoms, if acted upon in thoſe courts, may be pleaded in the ſuperior courts as matter of defence. *Wilmot* J. ſays, "Theſe cuſtoms, though local, are to be conſidered as allowable under the general law of the land when they come in queſtion in other courts, though the action muſt be brought in the local court." And *Yates* J. ſays, "That an action on the cuſtom can only be brought in the Mayor's Court of *London*, but the cuſtom may be pleaded in bar in a ſuperior court by way of defence, and in ſuch caſes the ſuperior court will take notice of the cuſtom." The language here uſed with reſpect to the cuſtom being put on record by way of a defence, will not ſupport the propoſition, that when the cuſtom is made the ground of action, it may be allowed in the ſuperior courts, becauſe put upon the record: for it is impoſſible to ſuppoſe that theſe great and learned perſons would have ſtated the manner of putting the cuſtom on record by way of defence, and at the ſame time have treated it as incapable of being made the ground of action. Indeed, Mr. Juſtice *Blackſtone*, in his report of the ſame caſe, p. 574. ſtates Lord *Mansfield* to have ſaid, "Any action that is brought againſt the wife by her creditors muſt be in the city courts; but the cuſtom being a good one, uſe may be made of it in any court in the kingdom." And the words of Mr. Juſtice *Yates*, according to the ſame report, are ſtill ſtronger, and ſhew with what diligence he had looked through the older caſes, without a knowledge of which they are not altogether intelligible. His words are, "Cuſtom of *London* may be pleaded in bar: while the cuſtom is executory, it can only be alleged in the Mayor's Court; when executed, it may be pleaded in any other court." And it appears that the Court there conſidered the cuſtom as executed, in the circumſtance of the aſſignees of the wife having poſſeſſed themſelves of her property, and that the cuſtom was therefore examinable in the ſuperior courts

BEARD *v.* WEBB; in Error.

courts in a caſe where it came collaterally before them. The next caſe to be conſidered is *Read* v. *Francis Jewſon*, as ſtated by Mr. Juſtice *Buller* in 4 *Term Rep.* 362. That was a motion to ſet aſide a judgment entered upon a warrant of attorney given by the Defendant a ſole trader under the cuſtom of *London*, at the ſame time with a bond in which ſhe was deſcribed milliner, citizen, and ſole trader. In the judgment it was ſtated, that ſhe was a *feme-covert* ſole trader, and that the money mentioned in the bond was advanced to her touching her craft. The objections to the judgment were, that it was not entered purſuant to the authority, that the huſband ought to have been impleaded jointly with the wife, though execution muſt be againſt the wife only; and that the action was not maintainable in the *King's Bench*, but ought to have been brought in the court of the city of *London:* the Court thought that the huſband alone could be prejudiced by the judgment, and had a right to bring a writ of error to reverſe it, but if he acquieſced they were inclined to think that the judgment ought to ſtand. However, they ordered the caſe to ſtand over in order to hear what the huſband had to ſay: and when the matter came on again the huſband appeared, and declared that he conſented to the motion. Lord *Manſfield* then obſerved, that it was an application to ſet aſide a judgment entered up *without authority*. He obſerved alſo, that no inſtance had been ſhewn in which a *feme-covert* ſole trader could execute a bond; and though ſhe is liable to ſimple contract debts, ſhe cannot give a bond. And he went further and ſaid, "A married woman cannot be made Defendant without her huſband." Whatever may have been determined in ſubſequent caſes, we have here the authority of Lord *Manſfield* himſelf for this propoſition, that in an action on the cuſtom of the city of *London* a married woman cannot be made Defendant without her huſband. Lord *Manſfield* alſo ſays, "She cannot give a warrant of attorney to confeſs judgment; and if ſhe cannot, how can ſhe make an attorney in *Weſtminſter-hall?*" Mr. Juſtice *Aſton* added, "By the better authority it ſeems that the action ought to be brought in the city courts, and the huſband ought to be joined. It is a principle of the common law that a woman ſhall never be put to anſwer without her huſband." And he concluded with ſaying, that the warrant of attorney "was an abſolute nullity." The caſe of *Pope* v. *Vaux*, 2 *Bl.* 1060. may be cited to ſhew that it was conſidered to be a matter of courſe to remand an action upon the cuſtom removed from the city court into the Court at *Weſtminſter*. Lord Ch. J. *De Grey* in the caſe of *Hatchett* v. *Baddeley*, 2 *Bl.* 1081. ſays, The general law is, that a *feme-covert* can neither ſue nor be ſued alone; and, amongſt the exceptions to that rule, takes notice of local cuſtoms, "as in the city of *London*, where a *feme-covert* being a ſole trader may be ſued; but there the huſband muſt be joined in the action at the outſet for conformity." The firſt caſe in which the queſtion, whether a *feme-covert*, having a ſeparate maintenance, could be ſued without her huſband, ſeems to have diſtinctly ariſen, is *Lean* v. *Schultz*, 2 *Bl.* 1195. The caſe, indeed, was decided on the form of the record rather than on the real merits of the queſtion; but there are ſome paſſages which are very material. The Court ſay, "The whole is totally vicious, as the huſband is not party to the record: and there is no inſtance in the books of an action being ſuſtained againſt the wife, the huſband being living, at home, and under no civil diſability." Whether this propoſition be maintainable as the law ſtands at the preſent day, or whether deeds of ſeparate maintenance, (if that can be called a deed which is executed by a married woman,) have introduced an exception to it, I do not pretend to determine. But the very next paſſage in that judgment is, "even by the cuſtom of *London*, though the wife and her effects are alone liable to execution if ſhe be a ſole trader, yet the huſband muſt be a co-defendant. And though a wife may acquire a ſeparate character by the civil death of her huſband, as by exile, profeſſion, or abjuration; yet by a voluntary ſeparation ſhe does not acquire ſuch a character as may be called a civil widowhood, nor is taken notice of by the law as ſuch." Then came the caſe of *Ringſtead* v. *Lady Laneſborough* (*a*): notwithſtanding the difficulties ſtated by Mr. Juſtice *Blackſtone* at the end of *Hatchett* v. *Baddeley*, as reſulting from the doctrine of allowing a *feme-covert* to be ſued alone, and notwithſtanding what was ſaid in *Lean* v. *Schultz*, yet in *Ringſtead* v. *Lady Laneſborough* thoſe two caſes were conſidered as having decided nothing in a caſe of a married woman having a ſeparate maintenance by deed. If that caſe be law, it is perhaps the only inſtance in which the huſband and wife may not plead *non eſt factum* to a deed executed by the latter. But admitting that caſe to be good law, yet it does not follow that in the particular caſe before the Court a *feme-ſole* trader can be ſued without her huſband in *Weſtminſter-hall*, unleſs it can be made out that the cuſtom of the city does not require the huſband to be

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(*a*) *Cooke*, *B. L.* 26. ed. 4.

joined in the city courts, or unleſs it can be ſhewn that ſhe ſtands on the ſame footing in *Weſtminſter-hall* as if ſhe had executed a deed of ſeparation. That ſuch was not the opinion of Lord *Mansfield* appears from his own words in *Ringſtead* v. *Lady Laneſborough*, which I ſtate from a note of that caſe with which I have been favoured by my Brother *Buller*. "This caſe," he ſays, "is not analogous to the caſe of a *feme-ſole* trader in *London*. There the huſband has not given up the right to the ſociety of his wife, or to her property in trade." Then I find the authority of Lord *Mansfield* for ſaying, that if that had been the caſe of a *feme-ſole* trader, the huſband muſt have been joined. I have alſo been favoured with a note of *Barwell* v. *Brooks*, from the ſame learned judge. In that caſe, and as I think for the firſt time, we find a propoſition ſtated which was made uſe of in the courſe of the argument for the Plaintiffs in this caſe, namely, that it is abſurd to join a party in the action againſt whom there can be no judgment. This is the only *ſcintilla* of a principle which I have been able to find anywhere to ſupport the propoſition that the huſband ought not to have been made a party to this ſuit. If this objection be valid, it applies ſtrongly to this caſe; for certainly there can be no judgment againſt the huſband here. But the queſtion is, Whether upon the authority of this ſingle dictum we are to overturn the ſeries of determinations which I have traced from the 1 *Edw.* 4. to the preſent day. Soon after this *Corbett* v. *Poelnitz*, 1 *Term Rep.* 5. was decided. Theſe three caſes certainly tend to eſtabliſh this point, that a married woman, having a ſeparate maintenance by deed, may make an attorney in the courts of *Weſtminſter-hall* as if her huſband was profeſſed, exiled, or had abjured the realm, or as if ſhe had never been married. Without ſaying one word more on theſe caſes, which are likely ſoon to come under diſcuſſion before all the judges; (*a*)—without preſuming to ſay how the difficulties enumerated by Mr. Juſtice *Blackſtone* in *Hatchett* v. *Baddeley*, and the additional difficulties ſtated by the Maſter of the Rolls in *Hyde* v. *Price*, 3 *Vez.* jun. 437. are to be ſurmounted, or how theſe caſes are to be reconciled with the judgment of the Court in *Lean* v. *Schultz*, or with the policy of the law of this country, reſpecting the relations which it forms in private families, conſtituting toge-

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(*a*) At this time the caſe of *Marſhall* v. *Mary Rutton*, in which judgment has ſince been given in *K. B.* (ſee 8 *Term Rep.* 545.) was pending before the twelve judges. The deciſion in that caſe eſtabliſhes, that a *feme covert* living apart from her huſband, and having a ſeparate maintenance ſecured to her by deed, cannot contract or be ſued as a *feme ſole*.

ther that great family called the public;—without inquiring how far in theſe caſes the Courts of Common Law have given a remedy againſt a married woman beyond what the Courts of Equity would afford;—without examining how it is to be argued that a *feme-covert* can execute a deed of ſeparation, when, in order to execute any deed, ſhe ought to be a *feme-ſole*;—without inquiring how we are to maintain that her contracts are good, becauſe ſhe is in a ſtate of ſeparation, her exiſtence in that ſtate originating in a deed or contract executed and entered into before ſhe is ſeparated;—without ſaying what anſwer we are to give to the Eccleſiaſtical Courts if, upon a ſuit for reſtitution of conjugal rights, they ſhould hold that it is not in the power of the parties themſelves to diſſolve by voluntary ſeparation this obligation to diſcharge the duties ariſing out of that particular contract which was formed in the preſence of God;—without inquiring, whether if thoſe Courts ſhould refuſe to admit, as a cauſe of ſeparation, any circumſtances upon which they would not decree a ſeparation, the Courts of Common Law would grant a prohibition to prevent their proceeding in a ſuit for reſtitution of conjugal rights;—without examining how far the caſe of *Rex* v. *Mead*, 1 *Burr.* 542. which eſtabliſhes, that a man having agreed to live ſeparate from his wife, ſhall not by force compel her to return to him, has or can have eſtabliſhed that a deed of ſeparation executed by a *feme-covert* binds her as her deed, and as effectually as if ſhe was ſingle, and ought to be enforced by courts of juſtice through all its conſequences;—without examining at preſent what is the true principle to be deduced from theſe and all the ſubſequent caſes capable of being applied to the contracts of married women having executed deeds of ſeparation, and having certain and ample or reaſonable maintenances, or having uncertain or inſufficient proviſions, having property, or not having property by the gift of the huſband, having annual allowances undiminiſhed or altogether anticipated by reaſonable or unreaſonable expence;—without examining how theſe and all the ſubſequent caſes can poſſibly be reconciled, and how far we can apply that principle, whatever it may be when once aſcertained, only to the contracts of ſuch married women, or to their other acts alſo of whatever nature, or how it is to be applied to their property;—without ſaying more on theſe caſes, it is enough for me to take notice that Lord *Loughborough* in *Compton* v. *Collinſon*, 1 *H. Bl.* 350. has expreſſed himſelf of opinion that the caſes alluded to are not to be conſidered as completely ſettled, and that the ſame learned Lord in a ſubſequent caſe of *Legard* v. *Johnſon*, 3 *Vez. jun.* 358.

1800.

Beard v. Webb; in Error.

declared that he had infinite difficulty in conceiving it poſſible to decree performance of a deed of ſeparate maintenance;—it is enough for me to obſerve, that in *Hyde* v. *Price*, 3 *Vez.* jun. 444. as laborious and diligent a judge as ever ſat in *Weſtminſter-hall*, the preſent Maſter of the Rolls, (after adverting to the caſes of *Corbett* v. *Poelnitz*, *Hatchett* v. *Baddeley*, and *Lean* v. *Schultz*, and obſerving, that Mr. Juſtice *Blackſtone*, in his laſt edition of his commentaries, continued to ſtate his text conformably to the opinion delivered by him in the Court of *Common Pleas*, and after referring to *Caudell* v. *Shaw* and *Read* v. *Jewſon*, to obviate the concluſion that it is ſo fully eſtabliſhed as the editor of the laſt edition of the Commentaries, ſuppoſes, that a *feme-covert* with a ſeparate maintenance by deed is to all intents and purpoſes a *feme ſole*,) ſays thus much, "In every one of the caſes that have occurred it has "been uniformly underſtood, that the act of the wife, or of the "huſband and wife jointly, cannot either by cuſtom or contract, or "otherwiſe, make her a *feme-ſole* ſo as to be ſubject to the proceſs "of the law as ſuch, and to be ſued as *femes-ſole* are ſued. "The ſame doctrine as that of *Corbett* v. *Poelnitz* came before "the Court of *King's Bench* in *Gilchriſt* v. *Brown*, 4 *Term Rep.* "766. and *Ellah* v. *Leigh*, 5 *Term Rep.* 679. The Court "evaded the queſtion how far *Corbett* v. *Poelnitz* was to be "acquieſced in to its full extent: but Lord *Kenyon* ſhews, that "he entertained a doubt upon the ſubject; which is all I wiſh "to have underſtood; that it may not be conſidered as "quite acquieſced in." I conclude, therefore, that theſe caſes are not ſettled; and even if they were ſettled, ſtill if the cuſtom of *London* be that the huſband muſt be joined with the wife to the extent of making the attorney who is to defend her, theſe deciſions will decide nothing as to the caſe of a *feme-ſole* merchant in *London* ſued without her huſband in *Weſtminſter-hall*. This brings me to the caſe of *Caudell* v. *Shaw*, which is the laſt I ſhall have occaſion to mention, and which was ſubſequent in point of time to *Corbett* v. *Poelnitz*, and the other two caſes on which I have obſerved. That caſe proves that a *feme-covert* ſole trader in *London* cannot ſue without her huſband in the courts at *Weſtminſter*. And if this be ſo, I think the converſe neceſſarily follows, that ſhe is not liable to be ſued there without him. In this view of the caſe it becomes unneceſſary to advert to what has been intimated upon the count upon an account ſtated. With reſpect to the argument of inconvenience, which has been urged, it is ſufficient to ſay, that if the

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law has decided that a *feme-ſole* trader in *London* can not be ſued elſewhere than in the city courts, thoſe who deal with her muſt take their remedy as the law has given it to them. Whatever may be the effect of the prevailing faſhions of the times, I do not think that the argument of inconvenience, ariſing out of thoſe faſhions, can at any time be relied upon againſt a current of deciſions: and I am ready to ſay, that if the policy of the law has withheld from married women certain powers and faculties, the courts of law muſt continue to treat them as deprived of thoſe powers and faculties, until the legiſlature directs thoſe courts to do otherwiſe. Much of what has been ſaid ought perhaps to be conſidered as affecting my judgment only: upon the whole, however, we are all of opinion, that the judgment of the *King's Bench* in this caſe muſt be reverſed.

Per Curiam, Judgment reverſed.

STEVENSON *v.* DANVERS.

Feb. 8th.

A. B. having been arreſted, on a *capias* ſued out againſt him by the name of *B. C.*; a bail-bond was given, by which *A. B.* arreſted by the name of *B. C.* became bound, conditioned for the appearance of *A. B.* arreſted by the name of *B. C.* The affidavit to hold to bail named the Defendant properly *A. B.* The Court amended the *capias* and return, and rejected an application by the bail, to ſet aſide the bail bond: but without prejudice to the ſheriff.

THE Defendant in this caſe was arreſted on a writ ſued out againſt him by the name of the Honourable *George Auguſtus Richard Danvers*, and a bail bond was entered into by which the Honourable *Auguſtus Richard Butler Danvers*, arreſted by the name of *George Auguſtus Richard Danvers*, together with his bail, became bound to the Sheriff of *Middleſex*, in the ſum of 8000*l.* conditioned for the appearance of the ſaid *Auguſtus Richard Butler Danvers*, arreſted by the name of *George Auguſtus Richard Danvers.* The real name of the Defendant was *Auguſtus Richard Butler Danvers*, and in that name the affidavit to hold to bail was made.

On account of this variance in the proceſs, a rule *niſi* was obtained on a former day, to diſcharge him, on entering a common appearance, and at the ſame time the Plaintiff in the action obtained a rule *niſi* to amend the writ.

In ſupport of the former rule *Shepherd* Serjt. contended, that the writ muſt be founded on the affidavit to hold to bail, for that as by the 5 *Geo.* 2. *c.* 27. no perſon can be holden to bail for any ſum under 10*l.* without an affidavit, in this caſe either the writ or the affidavit muſt be held to be good for nothing, and the Court muſt either ſupply a new affidavit or a new writ. He urged that if the amendment were allowed it would operate to the injury of the bail, who might have been willing to enter into the bail bond having a knowledge that the writ was defective, but would not have done ſo otherwiſe. He added that in this caſe there was nothing to amend by as the affidavit to hold to bail does not appear upon record.

Bayley Serjt. *contrà*, cited *Browne* v. *Hammond*, *Barnes* 10. *Hunt* v. *Kendrick*, 2 *Bl.* 836. *Newnham* v. *Law*, 5 *Term Rep.* 577. *Bourchier* v. *Wittle*, 1 *H. Bl.* 291. and *Carr* v. *Shaw*, 7 *Term Rep.* 299.

The Court thinking that as the affidavit to hold to bail was right there could be no queſtion ariſing upon the ſtatute which requires the affidavit to hold to bail, and that the writ might be amended thereby, diſcharged the rule for entering a common appearance, and made the rule for the amendment abſolute, without prejudice to any application which the bail might make on their own behalf.

Afterwards *Shepherd* on the part of the bail, obtained a rule to ſhew cauſe why the bail bond ſhould not be cancelled; and *Bayley* at the ſame time obtained a rule to ſhew cauſe why the ſheriff ſhould not amend his return in order to make it conformable with the amended writ.

When theſe rules came on to be diſcuſſed *Shepherd* was called upon by the Court to begin. Unleſs the arreſt was warranted by the proceſs at the time when it was made, it muſt be bad altogether; and giving a bail bond can be no waver of any defect in that proceſs. The diſtinction is between an irregularity and a defect in the proceſs; the former of which may be waved, but the latter not. *Goodwin* v. *Parry*, 4 *Term Rep.* 577. and *Huſſey* v. *Wilſon*, 5 *Term Rep.* 254. Indeed in every caſe of an application to cancel the bail bond for an irregularity in the proceedings, the argument would apply that the irregularity has been waved by the act of giving a bail bond. In fact waver is doing ſomething after an irregularity committed, where the irregularity might have been corrected before ſuch act done. Analogous to the rule in the caſes cited, is that which has been adopted in the caſe of ſupplemental affidavits, which are always refuſed where the original affidavit is defective, and only allowed where they are ambiguous, *Green* v. *Redſhaw* (*a*). The engagement of the bail is, that the Defendant ſhall appear if he has been properly arreſted (*b*).

(*a*) *Ante*, vol. 1. 228.

(*b*) In *Gardiner* v. *Dudgate*, 2 *Show.* 51. it is ſaid that "the bail bond to the ſheriff is to make the Defendant appear according to the writ, and not according to the condition of the bond."

Bayley was ſtopped by the Court.

Beſt Serjt. on the part of the ſheriff obſerved, that by the ſtatute of 23 *H.* 6. *c.* 9. the bail bond, and the proceſs muſt correſpond; that in the preſent caſe the bail bond did correſpond with the proceſs as originally iſſued, but that in conſequence of the amendment which had taken place, a variance had been created between the writ and the bail bond, which would prevent the ſheriff from bringing an action on the latter.

Upon this *the Court* diſcharged the rule for cancelling the bail bond, and made abſolute the rule for amending the return, but ordered that it ſhould be inſerted as a term in the latter rule, that no proceedings ſhould be had againſt the ſheriff without ſpecial notice being firſt given to the Court.

AUDLEY *v.* DUFF.

Feb. 10th.

Policy on the *Ceres* "at and from *Oporto* to *Lynn*, with liberty to touch at any ports on the coaſt of *Portugal* to join convoy particularly at *Liſbon*; at 12 guineas *per cent.* to return 6*l.* if ſhe *ſail with convoy from the coaſt of Portugal* and arrive." The *Ceres* ſailed from *Oporto* with a ſloop and cutter appointed to protect the trade of that place to *Liſbon*, from whence it was to proceed with the *Liſbond* trade under a larger convoy for *England*. In the way from *Oporto* to *Liſbon* the fleet was diſperſed by a ſtorm, and the *Ceres* judging for the beſt, run for *England* and arrived. Held that the aſſured was entitled to a return of premium.

THIS was an action for return of premium. The policy was on the ſhip *Ceres* "at and from *Oporto* to *Lynn*, with liberty to touch at one port before *Lynn*, to deliver wines, and to proceed and ſail to and touch and ſtay at any ports or places whatſoever on the coaſt of *Portugal* to join convoy particularly at *Liſbon*;" with this clauſe on which the preſent queſtion aroſe, "at the premium of twelve guineas *per cent.* to return 6*l.* if the *Ceres ſail with convoy from the coaſt of Portugal* and arrive (*a*)."

The cauſe was tried before Lord *Eldon* Ch. J. at the Guildhall Sittings after *Michaelmas* Term, when the following circumſtances appeared in evidence.—Lord *St. Vincent* having the command on the *Liſbon* ſtation, and finding himſelf unable to afford ſeparate convoys for *England* to all the ports upon the coaſt of *Portugal*, directed the *Speedy* cutter and *King's-fiſher* to go to *Oporto* and convoy the trade of that place from thence to *Liſbon*, where they were to lie in the bay *Doyras*, without entering the port of *Liſbon*,

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(*a*) At the time the rule *niſi* was obtained in this cauſe, a like motion was made in a caſe of *Everard* v. *Hollingworth*, the circumſtances of which were preciſely ſimilar with this, except that in the clauſe for return of premium the words uſed were "depart with convoy from *Portugal*" inſtead of "ſail with convoy from the coaſt of *Portugal*." The two caſes were now argued together, but it was admitted by the bar and the bench that the two expreſſions were the ſame in effect, and that the ſame conſtruction muſt prevail in both caſes.

ſo as to become chargeable with the *Liſbon* duties. From that place the *Romulus*, *Argo*, and *Alliance* were ordered to convoy the whole trade on their way to *England*; and off the *Scilly Iſles* the *Romulus* was to leave them, and protect the ſhips bound for *Ireland* to their place of deſtination. The *Oporto* fleet in proceeding to *Liſbon* being diſperſed, loſt the convoy, and the *Ceres* then judging for the beſt, run for *England* and arrived. At the time when the captains of the *Oporto* trade left that port, they conceived that they were to proceed direct for *England*, and did not learn the contrary until they received their ſailing inſtructions. It was within the knowledge of all parties when the policy was underwritten, that the coaſt of *Portugal* was much infeſted with privateers. The counſel for the Defendant contended, that the *Ceres* never left the *coaſt of Portugal* with convoy. The Lord Chief Juſtice directed the jury, that as the *Oporto* trade had put themſelves under the convoy of the *Speedy* cutter and *King's-fiſher* which formed one part of the aggregate convoy for *England*, they had thereby deprived themſelves of all power of acting for themſelves, and had therefore taken their departure from the coaſt of *Portugal* with convoy. He obſerved that the liberty given to the *Ceres* by the policy to touch at other ports on the coaſt of *Portugal*, did not vary the inference with reſpect to her being under convoy for *England* from the moment that ſhe received ſailing inſtructions. A verdict was found for the Plaintiff, with liberty to the Defendant to move for a nonſuit.

Accordingly a rule *niſi* having been obtained for that purpoſe on a former day;

Shepherd and *Bayley* Serjts. now ſhewed cauſe. It appears from the caſes that a ſhip is held to have ſailed on her voyage when ſhe has quitted her port of loading. *Bond* v. *Nutt*, *Cowp.* 601. and *Thelluſſon* v. *Ferguſon*, *Doug.* 361. And if ſhe ſail with a convoy appointed by Government, however that convoy be conſtituted, it is a fulfilment of a warranty to ſail with convoy. *Smith* v. *Redſhaw*, *Park. Inſur.* 349. and *De Garay* v. *Claggett*, *ibid* (a). Theſe authorities ſhew that the *Ceres* did depart from *Oporto* with convoy for *England*. All connection with the coaſt of *Portugal* was at an end as ſoon as ſhe had taken her departure from *Oporto*; and though ſhe was proceeding to the Bay *Doyras* in purſuance of her ſailing orders at the time when the fleet was diſperſed, ſhe was not the leſs upon her voyage to *England*. Had ſhe been ordered by her convoy to purſue any other courſe, ſhe muſt have obeyed, and though the courſe preſcribed might have been very much out of her way, yet ſhe would not have been guilty of a deviation. The clauſe for return of premium on which this queſtion ariſes muſt receive one of three conſtructions; 1ſt, if the ſhip ſail with convoy from that port on the coaſt of *Portugal* from which the *Oporto* convoy ſhall ſail; 2dly, if ſhe ſail with convoy from any port on the coaſt of *Portugal;* and 3dly, if ſhe ſail with convoy from the laſt port on the coaſt of *Portugal*, at which the convoy ſhall touch. If either of the two former conſtructions be correct, the Plaintiffs are entitled to recover; and it is hardly to be ſuppoſed that the underwriters when the policy was effected contemplated the third, ſince it was well known to them that the coaſt of *Portugal* was infeſted with privateers, and it was not therefore their intereſt to allow the *Ceres* to go from *Oporto* to *Liſbon* without convoy, in order to gain the return of premium by departing from thence with convoy.

(a) *Vid. et. D'Eguino* v. *Bewicke*, 2 *H. Bl.* 551. *Park. Inſur.* 349. a. and *Hibbert* v. *Pigow*, *ib.* 339.

Vaughan and *Lens* Serjts. in ſupport of the rule. It may be admitted that when the *Ceres* ſailed from *Oporto* with the *Speedy* cutter and *King's fiſher*, ſhe ſailed with convoy on the voyage inſured. The queſtion is, whether the ſailing from *Oporto*, was a ſailing from the coaſt of *Portugal?* That was a condition precedent, and unleſs ſtrictly complied with the Plaintiff cannot recover. The underwriters appear to have had two riſks in contemplation; 1ſt, while the ſhip was on the coaſt of *Portugal*, touching and ſtaying at the ports there, until ſhe had taken her final departure from thence; 2dly, from ſuch final departure till her arrival in *England:* and it was in conſideration of being relieved from a part of the latter riſk that the premium was to be returned. Now though it may be allowed that in a general ſenſe the convoy from *Oporto* was a convoy for *England*, yet it may alſo be conſidered in a more limited ſenſe, as a convoy along the coaſt of *Portugal:* and it is very clear that the underwriters did not mean the proviſo for a return of premium to attach until the *Ceres* had taken her departure from the coaſt with convoy acroſs the *Atlantic*. A policy of inſurance is an inſtrument in which matters are expreſſed with peculiar conciſeneſs. The Court therefore will be inclined to give effect to every word employed: but in this caſe the words "from the coaſt of *Portugal*" muſt be ſtruck out, unleſs they be conſtrued to mean "from the diſtrict of *Portugal*."

1800.
AUDLEY
v.
DUFF.

Lord ELDON Ch. J. After all the conſideration which I have been able to beſtow upon this ſubject, I remain of the ſame opinion which I entertained at the trial, and therefore think that the caſe was properly decided by the jury. The caſe is neither more nor leſs than this. From the diſpoſition of the enemy's force it happened that we had many merchant ſhips collected in the various ports of *Portugal.* Lord St. *Vincent* as commander upon that ſtation, was to provide a convoy for them in ſuch a manner as he ſhould think beſt. With reſpect to many of thoſe ſhips, it could hardly be aſcertained, at the time when the policies were underwritten, in what ports they were; though indeed it was underſtood that the *Ceres* was at *Oporto.* The uncertainty therefore under which the parties laboured, reſpecting the manner in which the convoy would be formed, and the place from which it would depart, created the neceſſity of employing the expreſſions which have been introduced into this policy. The aſſured agreed that on the ſhip being inſured from the port in which ſhe then was to *Lynn*, the underwriter ſhould have 12 guineas *per Cent.*; but that in caſe the voyage was undertaken with convoy, there ſhould be a return of 6*l.* *per Cent.* It being unknown from what port on the coaſt of *Portugal* the convoy would ſail, the clauſe for the return of premium was to be adapted to the circumſtances of the caſe. The departure with convoy might be from *Oporto*, or it might be from ſome other place; it became neceſſary therefore to introduce ſome expreſſion, which extended to ſomething more than a mere departure from *Oporto.* Had the inſurance been from *Portugal*, the introduction of the words, "from the coaſt of *Portugal*," might have furniſhed an argument in the Plaintiff's favour. But the inſurance being from *Oporto* which is a port on the coaſt of *Portugal*, it may be inferred that the aſſured intended to claim a return of premium, not only if the ſhip departed from *Oporto* with convoy, but if ſhe departed with convoy from any port on the coaſt of *Portugal*, not excluding *Oporto.* With reſpect to the liberty given by the policy to touch and ſtay at any ports on the coaſt of *Portugal*, I think it quite clear that when the ſhip departed from *Oporto* with convoy, that liberty was at an end. It muſt be underſtood that ſuch liberty was given to the *Ceres* when not under convoy; for then only would ſhe be in a ſituation to exerciſe it. Having in this caſe departed from *Oporto* with convoy, the policy muſt be conſidered as if the above mentioned liberty had never been conceded. The only fair interpretation of the agreement is, that the

1800.

AUDLEY
v.
DUFF.

aſſured ſhould have the benefit of the policy, though ſhe ſailed from *Oporto* without convoy, but that if the *Ceres* ſailed from *Oporto* which is on the coaſt of *Portugal* with convoy, then there ſhould be a return of premium.

HEATH J. This queſtion is new in ſpecie, becauſe it has ariſen on a tranſaction which never happened before. It had been uſual for ſhips to go from *Oporto* to *Liſbon* to meet with convoy. But in the preſent inſtance it was thought proper on account of the number of privateers, to ſend the *Speedy* cutter and *King's Fiſher* to collect the trade. There are however eſtabliſhed principles on which this caſe muſt be decided. It has always been underſtood that proviſions for a departure with convoy have relation to the cuſtom of trade and the orders of government, and ought therefore to receive a liberal conſtruction. There are many inſtances in *Park's Inſurance* where ſhips having been warranted to depart with convoy from the port of *London*, but the convoy having been appointed to ſail from the *Downs*, or from *Spithead*, reference has been had to the orders of government, and the warranties have been held to be fulfilled by joining convoy at thoſe places (*a*). It was contended that we ſhould in effect ſtrike out ſome of the words of the policy if we decided in favour of the Plaintiff; but that argument if juſt would apply to thoſe caſes to which I have alluded where ſhips have been warranted to depart with convoy from the port of *London*. The queſtion is, what was to be the *terminus a quo?* as to which I think the caſes cited are directly in point. I am clearly of opinion that the event has happened on which the contract for a return of premium was to attach, and if any doubt could be entertained upon the words, they muſt be conſtrued moſt favourably for the aſſured. The underwriters engaged to return the premium and *verba fortius accipiuntur contrà proferentem.*

ROOKE J. Since this rule was firſt moved for I have entertained ſome doubts upon the ſubject, but am now ſatisfied that the verdict is right. The premium was given on a war riſk: the *Ceres* therefore was at liberty either to touch and ſtay at any of the ports of *Portugal*, with a view to obtain convoy, or to ſail direct for *England* without convoy; but if ſhe obtained convoy then a part of the premium was to be returned. Now in this caſe there was a convoy appointed by relays to protect the trade to *England*; and

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(*a*) *Vid. Luethſlier's* caſe, 2 *Salk.* 443. and *Gordon* v. *Morley*, 2 *Str.* 1265. and *Park. Inſur.* 344.

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1800.

Audley *v.* Duff.

the captain of the *Ceres* having ſailed with that convoy with a *boná fide* intention to proceed for *England*, the proviſo for a return of premium has been complied with. Had the ſhip been warranted to depart with convoy, ſhe would have been under the neceſſity of leaving *Oporto* with the *Speedy* cutter and the *King's Fiſher*; and her ſo doing would have amounted to a fulfilment of the warranty. It is true that the policy is made by the broker of the aſſured; but the undertaking to return the premium, is the the undertaking of the underwriters and muſt therefore be conſtrued moſt ſtrongly againſt them.

Rule Diſcharged.

WHITE *v.* WILSON.

Feb. 11th.

Declaration by a ſailor for wages and the average price of a negro ſlave earned "during a certain voyage from the port of *London* to the coaſt of *Africa*, and from thence to the *Weſt Indies*;" at the trial it appeared from the articles that the voyage was, "from the port of *London*, upon an intended voyage to the coaſt of *Africa* for ſlaves, from thence to the *Weſt Indies* or *America*, and afterwards to *London* in *Great Britain*, or to her delivering port in *Europe*," and that no mention was made in the articles of the average price of a negro ſlave: Held that the variance between the deſcription of the voyage in the declaration and the articles was fatal, though the captain put an end to the voyage in the *Weſt Indies*, and diſcharged the crew there, and though the deſcription of the voyage in the declaration was under a *ſcilicet*; held alſo that the contract for the average price of a negro ſlave in addition to the wages was void, not being included in the articles according to the 2 *Geo.* 2. *c.* 36.

ASSUMPSIT. The 1ſt. count of the declaration ſtated "that heretofore, to wit, on, &c. at, &c. in conſideration that the Plaintiff on the retainer and at the ſpecial inſtance and requeſt of the Defendant, would enter himſelf and ſerve as chief mate of and on board a certain ſhip called the *Swallow*, whereof the Defendant was maſter, during a certain voyage, to wit, a certain voyage *from the port of London to the coaſt of Africa, and from thence to the Weſt Indies*, which the ſaid ſhip was then about to make, during which ſaid voyage certain negro ſlaves were intended to be purchaſed on the coaſt of *Africa*, and to be carried and conveyed from thence in the ſaid ſhip to the *Weſt Indies*, and there to wit in the *Weſt Indies* aforeſaid to be ſold, he the Defendant undertook and promiſed the Plaintiff to pay him at and after the rate of 6*l.* by the month, for each and every month during the ſaid voyage, and alſo ſo much money as ſhould be the average price, at and for which one of the ſaid negro ſlaves, ſo to be purchaſed, carried, conveyed and ſold as aforeſaid, ſhould be ſold in the *Weſt Indies* aforeſaid;" it then averred that the Plaintiff did enter himſelf as chief mate, and that the ſhip ſailed from *London*, on her ſaid intended voyage, "and in the courſe thereof proceeded to *Africa* aforeſaid, and from thence to the *Weſt Indies*, aforeſaid, and there to wit, at the *Weſt Indies* aforeſaid, afterwards, to wit, on, &c. completed and ended the ſaid voyage, the ſame having continued a long ſpace of time, to wit, the ſpace of eleven months";

1800.
WHITE
v.
WILSON.

that the Plaintiff ſerved as chief mate during the ſaid voyage; that divers negro ſlaves were purchaſed on the coaſt of *Africa*, and carried to the *Weſt Indies*, and there ſold, and that the average price for which they were ſold was 53*l.*; that by reaſon of theſe premiſes the Plaintiff became liable to pay 66*l.* in reſpect of the monthly wages, and 53*l.* as the average price of a negro ſlave. The 2d. count ſtated the Defendant to have promiſed "that over and above certain ſums of money, at and after a certain rate by the month then and there agreed to be paid by the Defendant to the Plaintiff, in reſpect of his ſaid ſervice during the ſaid laſt-mentioned voyage, he the ſaid Defendant would pay to the ſaid Plaintiff, ſo much money as ſhould be the average price, at and for which one of ſuch negro ſlaves to be purchaſed carried conveyed and ſold as laſt aforeſaid, ſhould be ſold in the *Weſt Indies* aforeſaid;" in all other reſpects it reſembled the 1ſt count. There were alſo counts in *indebitatus aſſumpſit* for wages, work and labour, money paid, had and received and on an account ſtated. Plea, *Non aſſumpſit.*

At the trial before Lord *Eldon* Ch. J. at the *Guildhall* ſittings after laſt *Hilary Term*, it appeared on the production of the ſhip's articles that they were intitled "Articles of agreement between the maſter, officers, mariners, ſeamen and ſeafaring men of the ſhip *Swallow*, bound from the port of *London*, upon an intended voyage to the coaſt of *Africa* for ſlaves, from thence to the *Weſt Indies, or America, and afterwards to London in Great Britain or to her delivering port in Europe*;" and that the rate of wages inſerted in them, agreed with that claimed in the 1ſt count, but no mention was therein made of any ſum of money to be paid to the Plaintiff, as the average price of a negro ſlave. It was then proved that the chief mate on board ſhips employed in the ſlave trade, uſually receives in addition to his wages the average price of one, or two negro ſlaves according to his contract, provided he does not miſbehave himſelf, and that in this caſe the Defendant had agreed to allow the Plaintiff the average price of one negro ſlave beyond his wages. It was alſo in evidence that the captain on his arrival in the *Weſt Indies*, broke up the voyage and diſcharged the crew. Two objections were made to the Plaintiff's recovery; 1ſt, that as the 2 *Geo.* 2. *c.* 36. had provided that all agreements for wages between captains and their crews ſhould be made in writing, the contract for the average price of a negro ſlave, could not be ſuperadded to the articles: 2dly, that there was a material variance between the deſcriptions of the voyage in the declara-

1800.

WHITE *v.* WILSON.

tion, and the evidence. A verdict was found for the Plaintiff with liberty to the Defendant to move for a nonſuit.

A rule *niſi* for that purpoſe having been obtained;

Lens and *Bayley* Serjts. now ſhewed cauſe; and obſerved that the articles produced at the trial which bore date the day after that on which the 37 *Geo.* 3. *c.* 90. impoſing a new ſtamp, took effect, had only the old ſtamp; they contended therefore, that as by the 2 *Geo.* 2. *c.* 36. *ſ.* 8. it is provided, that the articles ſhall be produced by the maſter, and that the ſeaman ſhall not fail in his ſuit for want of ſuch articles being produced, the fair conſtruction of that clauſe was, that the articles ſhould be produced in ſuch a ſtate as to be good evidence, but that not having the proper ſtamp in this caſe, they muſt be conſidered as not having been produced at all, and conſequently the objection of variance between the declaration and the articles did not ariſe. [But the *Court* ſaid, that if the Plaintiff were permitted to go into parol evidence wherever the articles produced were on an improper ſtamp or otherwiſe defective, it would amount to a repeal of thoſe legiſlative proviſions which direct that ſuch agreements ſhall be in writing and in a certain form]. They then contended, 1ſt, that the 2 *Geo.* 2. *c.* 36. applies only to contracts for wages in the ſtrict ſenſe of the word, and not to any collateral perquiſites agreed upon between the parties, which need not be ſpecified in the articles; 2dly, with reſpect to the variance, that the contract in queſtion was originally in the alternative, and might terminate in the *Weſt Indies*, and therefore the voyage which was the true conſideration of the Plaintiff's demand, and ſo underſtood between the parties, was correctly ſet out; or at any rate being only introduced in that part of the declaration, which ſtates the inducement for making the contract, and under a *ſcilicet*, it might be rejected as an immaterial averment (*a*); for as it would have been ſufficient to have alleged generally "a certain voyage," and then to have proved that voyage from whence the earnings accrued, the declaration might be read ſo as to avoid the variance by leaving out the deſcription of the voyage. They obſerved that in *Briſtow* v. *Wright*, *Doug.* 665. the variance which was there held fatal, was not under a *ſcilicet*, and referred to the ſeveral caſes of *Savage* v. *Smith*, 2 *Bl.* 1101. *Frith* v. *Gray* cited in the note to *Drewry* v. *Twiſs*, 4 *Term Rep.* 561. and *Peppin* v.

(*a*) If an averment be material, putting it under a *ſcilicet* will never make it immaterial. *Pope* v. *Foſter*, 4 *Term Rep.* 590. *Grimwood* v. *Barritt*, 6 *Term Rep.* 460. *Johnſon* v. *Picket*, *E.* 25 *Geo.* 3. *B. R.* cited per *Lawrence* J. 6 *Term Rep.* 463.

Solomons, 5 *Term Rep*. 496. to ſhew that an averment need not be proved where the declaration can be deemed perfect without it.

Shepherd and *Vaughan* Serjts. *contrà*, after citing *Webſter* v. *De Taſtet*, 7 *Term Rep*. 157. where three privilege ſlaves agreed to be given in addition to wages, were held to be wages, and therefore not inſurable, were ſtopped by the Court.

Lord Eldon Ch. J. I was rather of opinion at the trial that this voyage was capable of being repreſented merely as a voyage from *London* to *Africa* and from thence to the *Weſt Indies*: and that although the voyage deſcribed in the articles was a voyage from the port of *London* to *Africa*, from thence to the *Weſt Indies* or *America, and afterwards to* London *in* Great Britain *or to her delivering port in* Europe, yet that the latter part of the deſcription was not binding in a caſe in which there was no delivering port in *Europe*, the captain having broken up the voyage in the *Weſt Indies*, according to the option which ſeemed to have been veſted in him. I doubted whether it was not a contract in the alternative; and if ſo, whether it was not ſufficient to deſcribe that voyage which had really taken place (*a*). I am now, however, inclined ſtrongly to a contrary opinion, and think that the declaration ſhould have ſpecified the agreement as it was ſtated in the articles. The contract in the alternative ſhould have appeared upon the record, and the fact of the voyage having terminated in the *Weſt Indies* ſhould have been averred. And this will be found to be the more neceſſary, if we attend to the policy of the various acts of parliament which have provided different forms of articles for different voyages. With reſpect to the additional perquiſite of the average price of a negro ſlave, it is impoſſible to conſider it in any other light than that in which it was conſidered in *Webſter* v. *De Taſtet*, namely, as wages. If the legiſlature have decided that all agreements for wages ſhall be in writing, and the practice be not to put in writing

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(*a*) See *Layton* v. *Pearce*, *Doug*. 15. where it was decided in the caſe of an alternative contract, that the party who had rot the option, could not ſtate it as an abſolute contract. Lord *Mansfield*, indeed, there laid down that if the option had been in the party pleading, it had been otherwiſe. On the authority of this dictum, it was contended, in *Churchill* v. *Wilkins*, 1 *Term Rep*. 447. that a contract in the alternative, where the option is in the party pleading, may be ſtated as an abſolute contract; and this ſeems to have been admitted by *Buller* J.; for his reaſoning went to ſhew that the contract in that caſe which was "to deliver tallow at 4*s*. per ſtone, and ſo much more as the Plaintiff paid to any other," was not a contract in the alternative, but merely a contract depending on a contingency, and therefore not within the above rule applicable to alternative contracts. However, in the ſubſequent caſe of *Tate* v. *Wellings*, 3 *Term Rep*. 531. the Court held, that the Defendant could not plead a contract, which was in the alternative, as an abſolute contract, though the option was in himſelf.

contracts for the price of one, two or more ſlaves, that practice, if allowed to prevail, may be made the means of evading the proviſions of the act.

Heath J. I am of the ſame opinion. It is not ſufficient for the Plaintiff to ſtate in his declaration "a certain voyage," as the conſideration of his wages; but he muſt ſpecify what that voyage was.

Rooke J. Of the ſame opinion.

Rule abſolute.

Feb. 11th.

Goodtitle ex dem. Wanklen *v.* Badtitle.

Affidavit of ſervice in ejectment made by a perſon who ſaw the declaration ſerved and heard it explained, to the tenant in poſſeſſion is ſufficient to entitle the Plaintiff to judgment againſt the caſual ejector.

Williams Serjt. moved for judgment againſt the caſual ejector, and mentioned that the affidavit of ſervice was not made by the perſon who ſerved the declaration, but by a perſon who ſwore, that he ſaw the tenant in poſſeſſion ſerved, and heard the perſon who ſerved him with it acquaint him with the true intent and meaning of the declaration and notice.

The Court held this affidavit ſufficient.

Feb. 12th.

W. Mainwaring, G. B. Mainwaring, and T. Chatteris *v.* Newman.

Aſſumpſit by *A. B.* and *C.* againſt *D.* as one of the indorſers of a promiſſory note drawn by *E.* in favour of *C. D.* and (himſelf) *E.* then in partnerſhip and by them indorſed to *A. B.* and *C.*; plea in bar that *C.* one of the Plaintiffs is liable as an indorſer, together with *D.* and held good on ſpecial demurrer.

The declaration in this caſe ſtated "that one *James Brander* on &c. at &c. made his certain note in writing commonly called a promiſſory note his own proper hand-writing being thereunto ſubſcribed bearing date the ſame day and year aforeſaid and then and there delivered the ſaid note ſo ſubſcribed to the ſaid *William Newman* and one *James Brander* and one *Thomas Chatteris* carrying on trade together in partnerſhip under the name ſtyle and firm of *Newman Brander* and *Chatteris* by which ſaid note the ſaid *James Brander* two months after date promiſed to pay to the order of the ſaid *William Newman James Brander* and *Thomas Chatteris* by the names and deſcription of Meſſrs. *Newman Brander* and *Chatteris* 280*l.* value in account And the ſaid *William Newman James Brander* and *Thomas Chatteris* to whoſe order the payment of the ſaid ſum of money in the ſaid note contained was thereby appointed to be made afterwards and before the payment of the ſaid ſum of money in the ſaid note contained or any part thereof and before the time thereby appointed for ſuch payment to wit on &c. at &c. indorſed the ſaid note the handwriting of one of them on their joint and partnerſhip account and in their joint and partnerſhip name ſtyle and firm of *Newman Brander* and *Chatteris* being thereunto ſubſcribed and by that indorſement appointed the contents of the ſaid note to be paid to the ſaid *William Mainwaring George Boulton Mainwaring* and *Thomas Chatteris*, and then and there delivered the ſaid note ſo indorſed to the ſaid *William Mainwaring George Boulton Mainwaring* and *Thomas Chatteris* of which ſaid indorſement ſo made upon the ſaid note as aforeſaid the ſaid *James Brander* afterwards to wit on &c. at &c. had notice And the ſaid *William Mainwaring George Boulton Mainwaring* and *Thomas Chatteris* aver that afterwards and when the ſaid note became due and payable (to wit) on &c. at &c. they the ſaid *William Mainwaring George Boulton Mainwaring* and *Thomas Chatteris* ſhewed and preſented the ſaid note ſo indorſed as aforeſaid to the ſaid *James Brander* for his payment of the ſaid ſum of money therein contained and then and there required him to pay the ſame But the ſaid *James Brander* did not then or at any time whatſoever pay the ſaid ſum of money in the ſaid note mentioned or any part thereof but then and there wholly refuſed ſo to do of all which premiſes the ſaid *William Newman James Brander* and *Thomas Chatteris* afterwards to wit on &c. at &c. had notice By reaſon of all which premiſes and by force of the ſtatute in that caſe made and provided the ſaid *William Newman* became liable to pay the ſaid *William Mainwaring George Boulton Mainwaring* and *Thomas Chatteris* the ſaid ſum of money in the ſaid note mentioned and being ſo liable the ſaid *William Newman* in conſideration thereof afterwards to wit on &c. at &c. undertook and to the ſaid *William Mainwaring George Boulton Mainwaring* and *Thomas Chatteris* then and there faithfully promiſed to pay to them the ſaid ſum of money in the ſaid note mentioned when he the ſaid *William Newman* ſhould be thereunto afterwards requeſted." There were alſo counts in *indebitatus aſſumpſit* for money had and received, money paid, and money lent, and on an account ſtated, in each of which *William Newman* was ſtated to be indebted to *William Mainwaring*, *George Boulton Mainwaring*, and *Thomas Chatteris*, and in conſideration thereof, to have promiſed to pay to them 7000*l.* Theſe counts were followed by the common breach that *William Newman* had not paid to the ſaid

1800.
MAINWARING
v.
NEWMAN.

William Mainwaring, *George Boulton Mainwaring*, and *Thomas Chatteris*, or either of them, *&c.*

Pleas. 1ſt, *Non aſſumpſit.* 2dly, "That the ſaid *Thomas Chatteris*, one of the ſaid payees and indorſers of the ſaid promiſſory note in the firſt count of the ſaid declaration mentioned, is one and the ſame perſon with the ſaid *Thomas Chatteris* one of the ſaid Plaintiffs, and not other or different, and that the ſaid ſeveral promiſes and undertakings in the ſaid declaration mentioned were, and each of them was, made by the ſaid *William Newman* together with the ſaid *Thomas Chatteris*, jointly, and not by him the ſaid *William Newman* ſeparately from and without the ſaid *Thomas Chatteris*, to wit, at, *&c.* And this, *&c.* Wherefore *&c.*"

To this ſecond plea there was a ſpecial demurrer aſſigning for cauſes "that the ſaid *William Newman* hath not in or by that plea traverſed or denied the making by him the ſaid *William Newman* of the ſaid promiſes or undertakings in the ſaid declaration mentioned, nor hath he thereby confeſſed and ſufficiently avoided the ſame. And alſo for that the ſaid *William Newman* hath thereby attempted to plead in bar of the action of the ſaid *William Mainwaring*, *George Boulton Mainwaring*, and *Thomas Chatteris*, matters which ought to have been pleaded, if at all, in abatement of the original writ of the ſaid *William Mainwaring*, *George Boulton Mainwaring*, and *Thomas Chatteris*, and not in bar of the ſaid action. And alſo for that the ſame plea doth not mention but wholly omits the ſaid *James Brander*, the other payee and indorſer in the firſt count of the ſaid declaration mentioned of the ſaid promiſſory note therein mentioned And alſo for that the matters contained in the ſame plea are wholly immaterial and contain no anſwers to the ſaid declaration of the ſaid *William Mainwaring*, *George Boulton Mainwaring*, and *Thomas Chatteris*, and that the ſame is in other reſpects evaſive, argumentative, and informal."

Lens Serjt. in ſupport of the demurrer. The ſubject of the Defendant's plea is, not that the ſame perſon is Plaintiff and Defendant, but that one of the Plaintiffs being alſo one of the payees might have been made a defendant. Of this the Defendant might have taken advantage by plea in abatement, but having omitted to do ſo, the Court will not now take notice that this matter, which is the proper ſubject of a plea in abatement, appears on the record. *Deering* v. *Moor*, *Cro. Eliz.* 554. *Cabell* v. *Vaughan*, 1 *Saund.* 291. *Addiſon* v. *Overend*, 6 *Term Rep.* 766. The courſe which the Defendant ſhould have purſued is this; he ſhould firſt have pleaded in abatement, that *T. Chatteris*, one of the payees, was not joined as a Defendant, and then upon his being made a Co-defendant, he ſhould have pleaded in bar that the ſame perſon was made a Plaintiff and a Defendant. If it be inſiſted that this could not have been pleaded in abatement becauſe a better writ could not have been given, it may be obſerved, that it is not an invariable rule that a better writ muſt be given in ſuch a caſe. *Symonds* v. *Parmenter*, 2 *Str.* 1269. (*a*) In this caſe, however, a better writ might have been given, ſince by ſuch a writ as has been ſuggeſted all the payees would have been made Defendants in the ſuit. Though perhaps it may appear on the face of the firſt count that the ſame perſon, who is one of the Plaintiffs, ought to have been made a Defendant, yet this obſervation does not apply to the three laſt counts, where the contract is alleged to have been made with *Newman* only. It is true, that the plea, which is pleaded to the whole declaration, avers that the ſeveral promiſes were made by *Newman* coupled with others; but that is only the ſubject of a plea in abatement to the three laſt counts, upon the face of which it does not appear that *T. Chatteris* may be both Plaintiff and Defendant: the plea, therefore, being pleaded to the whole declaration, is bad. Beſides, the promiſes being jointly made by *Newman*, one *James Brander*, and *Thomas Chatteris*, the Defendant's plea, which ſtates them to have been made by *Newman* and *Chatteris* only, is on that account alſo incorrect.

Heywood Serjt. *contrà*. As it was impoſſible for the Defendant in this caſe to give a better writ to the Plaintiff, he could not plead in abatement; and as it was neceſſary to introduce upon the record the fact of the promiſes being made jointly by the Defendant and one of the Plaintiffs, the Defendant was compelled to adopt the ſpecial plea in queſtion. Had this matter appeared diſtinctly on the face of the declaration, the Defendant might have demurred, ſince the objection deſtroys the Plaintiff's right of action. No diſtinction can now be taken on the form of the different counts, becauſe the plea has averred that *all* the promiſes were made by *Newman* and *T. Chatteris* jointly. With reſpect to *Addiſon* v. *Overend*, it might be ſufficient to obſerve that it was a caſe of *tort*, and therefore not applicable to the caſe now before the Court. It appears to me, however, that the deciſion in *Addiſon* v. *Overend* proceeded on a miſtake. The objection appeared on the face of the declaration; now, if that which is the ſubject of a plea in

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(*a*) Vide etiam *Vin. Abr.* tit. *Abatement*, (E. b.) *Com. Dig.* tit. *Abatement*, (I. 2.)

abatement appear on the face of the declaration, why call for a plea in abatement? the only object of which is to introduce on the record that which will give the Plaintiff a better writ. The caſes prove, that where a Plaintiff by his own ſhewing cannot maintain the action on his writ, the Court will abate the writ *ex officio* (a). The argument of the Court in *Addiſon* v. *Overend* was, that if the ſubſtance of a plea in abatement appear on a ſpecial verdict, it ſhall not abate the writ, and therefore that it ſhould not, where it appears on the declaration; but it may be obſerved, that if ſuch a fact appear on a ſpecial verdict, it appears there improperly, ſince it ought never to have been received in evidence. The expreſſion in *Deering* v. *Moor* is, "the finding it by the jury is not material (b)." The ſubſtance of the plea is not that the Plaintiffs have ſued *one* on a *joint* contract, but that one of the Plaintiffs ought alſo to have been made a Co-defendant; and the objection is, that the promiſe on which the Plaintiffs have ſued is ſuch a promiſe as cannot be enforced againſt the Defendant. This very point was decided in *Moffatt and Others* v. *Van Millingen*, *E.* 27 *G.* 3. *B. R.* (c) With reſpect to the laſt objection to the plea, that one *James Brander* was alſo liable, it may be anſwered, that the name of *Newman* alone appears in the three laſt counts, and that the only other name introduced by the plea is that of *Chatteris*; and although the name of *J. Brander* appear on the firſt count as one of the payees *non conſtat* that he is not dead (*a*).

(a) Vide 1 *Roll.* 176. *Hob.* 199. 280. and 281. and the caſes collected in *Vin. Ab.* tit. *Abatement*, (K. b.)

(b) Vid. etiam *Harman* v. *Whichlow*, *Lach.* 152. where this diſtinction was taken by Sir *W. Jones*, and agreed by the Court. So in *Whelpdale*'s caſe, 5 *Co.* 119. *Stead* v. *Moon*, *Cro. Jac.* 152. and *Holdwich et Ux.* v. *Chaſe*, *All.* 42. the Court refuſed to abate the writ where matter pleadable in abatement appeared on ſpecial verdict. But in *Horner* v. *Moor*, cited 5 *Bur.* 2614. where ſuch matter appeared on the declaration, and in the *King* v. *Young*, cited 6 *Term Rep.* 769. where it appeared on *ſcire facias* the Court did abate the writ though it was not pleaded.

(c) *Moffatt and Others* v. *Van Millingen*, *Eaſt*, 27 *G.* 3. *B. R.* *Indebitatus aſſumpſit* by the Plaintiffs as executors. The plea averred that the promiſes if any were made by the Defendants, together with two others, and the Plaintiff *Moffat*, and concluded with praying that the *declaration* might be quaſhed. To this there was a ſpecial demurrer, aſſigning for cauſe that the Defendant had concluded by praying that the declaration might be quaſhed, and had pleaded in abatement of the declaration, whereas he ſhould have pleaded in abatement of the bill, *&c.* On this demurrer the Plaintiffs had judgment of *reſpondeas ouſter*; whereupon the Defendants now pleaded in bar, "that "the ſeveral promiſes and undertakings in "the ſaid declaration mentioned, if any ſuch "were or was made, were and each and "every of them was made by them, the De- "fendants, together with the ſaid *William* "*Moffatt*, one of the Plaintiffs in this cauſe, "jointly, and not by them the ſaid Defend- "ants ſeparately from and without the "ſaid *William Moffatt*, to wit, at, *&c.* And "this, *&c.* Wherefore, *&c.*" To this plea the Plaintiffs demurred.

Wood for the Plaintiffs contended that this matter could only be pleaded in abatement; that *Moffatt* was in *auter droit* as executor and truſtee; and that the debt was not extinguiſhed in equity by his being executor to the perſon entitled.

Buller J. (without hearing *Gibbs* for the Defendant.) The promiſe was made jointly with one of the Plaintiffs. How can he ſue himſelf in a Court of Law? It is impoſſible to ſay that a man can ſue himſelf.

Judgment for the Defendant.

Cur. adv. vult.

Lord ELDON Ch. J. on a ſubſequent day ſaid; The preſent opinion of the Court is that the Defendant muſt have judgment. Indeed it appears to me that the ſubject of the preſent plea could not have been pleaded in abatement; becauſe a plea in abatement ought to give a better writ, not to ſhew that the Plaintiff can have no action at all. Certainly the caſe is of great importance, and it has not been without ſome heſitation that I have been able to come to a deciſion upon it. The facts of the caſe are theſe; a man of the name of *Brander* makes a promiſſory note to three perſons, namely, to *Newman*, to himſelf, *Brander*, and to *Thomas Chatteris*. This note is indorſed to *William Mainwaring*, *George Boulton Mainwaring*, and *Thomas Chatteris*, who are clearly the perſons appearing on this record as Plaintiffs. The effect of a judgment for the Defendant will be, that if a man make a note to himſelf and others carrying on buſineſs under a particular firm, and that partnerſhip be diſſolved, the promiſſory note can neither be put in ſuit as ſuch, nor enforced as an equitable agreement, becauſe on a promiſſory note ſtamp. Conſidering therefore the quantity of circulating paper in this country ſtanding under the ſame circumſtances with the note in queſtion, the conſequences of ſuch a deciſion may be highly injurious. However the caſe of *Moffatt* v. *Van Millingen* cited by my brother *Heywood* is unanſwerable.

The caſe ſtood over till this day, when the Court obſerved, that if any inconvenience ſhould reſult from a judgment in favour of the Defendant it was for the Legiſlature to interfere, but that the Defendant was entitled to judgment.

Judgment for the Defendant.

(*a*) See as to this point *Cabell* v. *Vaughan*, and the notes ſubjoined thereto in *Williams's Saunders*, vol. 1. p. 291.—It may alſo be obſerved, that as *James Brander* was not one of the Plaintiffs, his liability to be made a co-defendant was only the ſubject of a plea in abatement, (ſee *Williams's Saunders ubi ſupra*,) and conſequently to have introduced his name into the plea in bar, would have been incorrect.

1800.

Feb. 12th.

Defendant being arreſted on a writ returnable the laſt return of *Mich.* Term, put in bail on the laſt day of that term, who juſtified on the firſt day of *Hil.* Term; a declaration was delivered on the third day of *Hil.* Term, and in the ſame Term judgment was ſigned for want of a plea. Held regular, the Defendant not being entitled to an imparlance.

BAILEY *v.* HANTLER.

THE Defendant being arreſted in *Michaelmas* Term on a writ returnable the laſt return of that term, put in bail on the laſt day of that term, who juſtified on the firſt day of *Hilary* Term; a declaration was delivered on the 25th of *January*, indorſed to plead in four days, otherwiſe judgment, and in the evening of that day a rule to plead was given; on the 28th of *January* a plea was demanded, and on the 31ſt of the ſame month judgment was ſigned for want of a plea.

On a former day *Shepherd* Serjt. obtained a rule *Niſi* for ſetting aſide this judgment and all ſubſequent proceedings thereon, with coſts, on the ground of the Defendant's being entitled to an imparlance, and therefore not obliged to plead, the declaration not having been delivered until after the *Eſſoign-day* of *Hilary* Term. On this day he contended, that the Plaintiff ſhould have delivered his declaration *de bene eſſe* before the *Eſſoign-day*, in order to deprive the Defendant of an imparlance over this term, and cited a caſe to this effect from 1 *Cromp. Pr.* 126. *Ed.* 3. 26th *January* 1764.

Bayley Serjt. *contrà* inſiſted that the Plaintiff was never obliged to declare *de bene eſſe*, and that he could not declare in chief until the bail were perfected, which was not till after the *Eſſoign-day*.

The Court after referring to the officers ſaid, that although a Plaintiff be entitled to declare *de bene eſſe* if he pleaſe before the Defendant is in court, yet that he is not compellable to do ſo, and that the judgment was therefore regular.

Rule diſcharged (*a*).

(*a*) *Vid.* 1 *Sellon Pract.* 268. *ed.* 2. *Rook* v. *The Earl of Leiceſter*, 2 *Term Rep.* 16. and *Rolleſton* v. *Scott*, 5 *Term Rep.* 372.

Mr. Juſtice BULLER was abſent during the whole of this Term from indiſpoſition.

In this Term *William Draper Beſt* of the *Middle Temple* Eſquire, was called to the honourable degree of Serjeant at Law, and gave rings with this motto, "*Libertas in legibus.*"

THE END OF HILARY TERM.

1800.

CASES

ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER,

AND

In the HOUSE OF LORDS;

IN

Eaſter Term,

In the Fortieth Year of the Reign of GEORGE III.

The KING *v.* SMITH.

In an indictment on the 15 *G.* 2. *c.* 28. *ſ.* 3. it is not neceſſary to aver that the Defendant is a common utterer of falſe money.

THE Defendant was indicted at the Summer aſſizes for *Kent* 1799, on the 15 *Geo.* 2. *c.* 28. *ſ.* 3.

The indictment ſtated, that the defendant on, &c. "with force and arms at &c. one piece of falſe and counterfeit money made and counterfeited to the likeneſs and ſimilitude of a piece of good lawful and current money and ſilver coin of this realm called an half-crown, as and for a piece of good lawful and current money and ſilver coin of this realm called an half-crown then and there unlawfully unjuſtly and deceitfully did *utter* to one *J. F.*, he the ſaid Defendant at the time when he ſo uttered the ſaid piece of falſe and counterfeit money, then and there well knowing the ſame to be falſe and counterfeit, and alſo that he the ſaid Defendant at the time when he ſo uttered the ſaid piece of falſe and counterfeit money as aforeſaid to wit on &c at &c had about

him

1800.

The King
v.
Smith.

him the ſaid Defendant in the cuſtody and poſſeſſion of him the ſaid Defendant one other piece of falſe and counterfeit money made and counterfeited to the likeneſs and ſimilitude of a piece of good lawful and current money and ſilver coin of this realm called an half-crown he the ſaid Defendant then and there well knowing the ſaid laſt-mentioned piece of falſe and counterfeit money to be falſe and counterfeit. In contempt &c againſt the form of the ſtatute" &c. (a)

The Defendant was tried and found guilty before *Buller* J. who reſerved the following queſtion for the opinion of the Judges, *viz.* Whether the indictment ſhould have concluded with an averment that the Defendant was a common utterer of falſe money?

The caſe was argued before the Judges (*abſente Buller* J.) in the Exchequer Chamber.

Gurney for the priſoner contended, that when the law gives any particular name to an offence, that offence ought not to be deſcribed in an indictment by any circumlocution; as in murder where all the circumſtances which conſtitute the crime, if ſtated in the indictment, will not diſpenſe with the allegation that the party is guilty of murder; that the ſame rule obtained with reſpect to perjury, and that as the ſtatute had in this inſtance declared that a perſon under certain circumſtances ſhould be deemed a common utterer of falſe money, the indictment ought to have charged him with being ſo, in the very words of the ſtatute.

Fielding on the part of the proſecution argued, that the concluſion of law neceſſarily reſulted from the facts ſet forth; that the Legiſlature after ſtating the circumſtances which conſtitute the crime, had declared, that a perſon offending againſt this proviſion of the act, ſhould be "deemed and taken to be a common utterer," which words are equivalent to the expreſſion "adjudged a common utterer;" that this caſe therefore was not like thoſe where a technical name having been given by the Legiſlature to the offence itſelf, that name muſt be employed in deſcribing ſuch offence.

(a) Which enacts, "that if any perſon whatſoever ſhall utter or tender in payment any falſe or counterfeit money knowing the ſame to be falſe or counterfeit to any perſon or perſons and ſhall either the ſame day or within the ſpace of ten days then next utter or tender in payment any more or other falſe or counterfeit money knowing the ſame to be falſe or counterfeit to the ſame perſon or perſons or to any other perſon or perſons or ſhall at the time of ſuch uttering or tendering have about him or her in his or her cuſtody one or more piece or pieces of counterfeit money beſides what was ſo uttered or tendered then ſuch perſon ſo uttering or tendering the ſame ſhall be deemed and taken to be *a common utterer of falſe money* and being thereof convicted ſhall ſuffer a year's impriſonment, and ſhall find ſureties for his or her good behaviour for two years more to be computed from the end of the ſaid year."

At the enſuing Spring aſſiſes for *Kent*, *Heath* J. delivered the opinion of the Judges that the indictment was well enough.

Gibson *v.* Chaters.

May 5th.

In an action for maliciouſly holding to bail, it is not ſufficient to prove that the writ was ſued out after payment of the debt, if the circumſtances afford no inference of malice; but in ſuch caſe evidence of actual malice muſt be given.

This was an action on the caſe for maliciouſly and without any juſt or probable cauſe arreſting the Plaintiff and holding him to bail.

At the trial before Lord *Eldon* Ch. J. at the Guildhall ſittings after laſt *Hilary* term, it appeared that the Plaintiff and the Defendant were both reſident at *North Shields* in *Northumberland*, the former being the maſter, and the latter the owner of a ſhip; that ſome matters in difference between them having been ſubmitted to arbitration, the Plaintiff was awarded to pay the ſum of 19*l.* 14*s.* on the 31ſt of *November* 1797, but in conſequence of his being abſent from home at that time, and not returning till *March* 1799 did not pay the ſum awarded; that in *December* 1798 the Defendant being in *London* made an affidavit of debt to hold the Plaintiff to bail, and that a writ iſſued thereupon; that on the Plaintiff's return to *North Shields* in *March* 1799, he hearing of the Defendant's intention to arreſt him, paid the debt to the Defendant's agent at *North Shields*, and took a receipt for the amount; that on the 4th of *May* following, the plaintiff having arrived in the river *Thames* from *North Shields*, was arreſted and holden to bail by the Defendant's attorney, on an *alias* writ taken out at that time, but grounded on the affidavit made by the Defendant in *December* 1798. His Lordſhip being of opinion that it was neceſſary to prove expreſs malice, and that no evidence of malice had been given, nonſuited the Plaintiff.

Beſt Serjt. now moved for a rule *niſi* to ſet aſide this nonſuit, and have a new trial; contending that the caſe was diſtinguiſhable from that of *Scheibel* v. *Fairbain*, *ante*, vol. 1. p. 388.; the writ on which the Plaintiff in that caſe was arreſted having been ſued out previous to the time when the debt was paid, whereas the writ in the preſent inſtance was actually taken out after the debt had been diſcharged and a receipt given; that the ground of complaint in *Scheibel* v. *Fairbain* was a mere nonfeaſance in the Defendant who had omitted to countermand a writ previouſly ſued out, and was ſo treated by the Court, but that this was a malfeaſance and came expreſsly within the rule laid down in *Waterer* v. *Freeman*, *Hob.* 267. that a man is liable to an action if he ſue againſt his releaſe, or after the debt duly paid. He obſerved, that the rule with reſpect to proving malice in actions for malicious proſecutions, did not hold in the caſe of actions for holding to bail in a mere civil ſuit, ſince the rule in the former inſtance proceeded on the danger of diſcouraging proſecutions for public offences.

But *the Court* were of opinion that the facts of this caſe precluded any inference of malice, and that the Plaintiff therefore to entitle himſelf to recover ought to have given evidence of actual malice.

Beſt took nothing by his motion.

May 8th.

Shirley *v.* Sankey and Others, Executors of Collingwood.

An action will not lie on a promiſory note given in payment of a wager on the amount of the hop-duties.

This was an action on a promiſory note for 157*l.* 10*s.* dated the 12th *July* 1793.

The cauſe was tried before *Hotham* B. at the laſt Spring aſſiſes for *Kent*, when it was proved that in *Auguſt* 1792 the Plaintiff and the Defendants' teſtator laid a wager on the amount of the hop-duties for that year; that the event proving favourable to the Plaintiff, the Defendants' teſtator gave him the promiſory note in queſtion for the amount of the wager.

At the trial it was objected, that ſince it was eſtabliſhed by the caſe of *Atherſold* v. *Beard*, 2 *Term Rep.* 610. that wagers on the amount of the hop-duties, or of any other branch of the public revenue, were illegal, and no action could be maintained upon them, therefore the preſent Plaintiff could not maintain an action on this note, the conſideration of which was a wager upon the amount of the hop-duties.

The learned judge being of that opinion nonſuited the Plaintiff.

Bailey Serjt. on a former day moved to ſet aſide that nonſuit, and contended, that this caſe was diſtinguiſhable from *Atherſold* v. *Beard;* firſt becauſe the note was not given until the growth of the hops was complete, conſequently it was not poſſible for either party to affect the amount of the duties with a view to his own intereſt; ſecondly, that as the queſtion reſpecting the amount of the duties was admitted by the note to be in favour of the Plaintiff, no diſcuſſion of that queſtion need now take place, and therefore no inconvenience could ariſe to the public. He urged that this note ſtood on a different footing from notes given on ſmuggling or other illegal tranſactions of that kind, ſince the wager which was the conſideration of it, was neither illegal or immoral in itſelf, though the Court had refuſed to enforce it on account of public inconvenience.

The Court ſaid, they would look into the caſe of *Atherfold* v. *Beard* before they granted a rule *niſi*, and on this day

Lord ELDON Ch. J. ſaid, We can diſcover no difference between this caſe and that of *Atherfold* v. *Beard*. There alſo the diſcuſſion reſpecting the amount of the hop-duties was ſhut out; for the Plaintiff gave in evidence the admiſſion of the Defendant that he had loſt his wager, and upon that evidence obtained a verdict (*a*). What difference then is there between the two caſes?

Bayley Serjt. took nothing his motion.

(*a*) In that caſe, which came on by motion in arreſt of judgment, *Groſe* J. obſerved, that the objection to the wager appeared upon the face of the record; where the Defendant's admiſſion as to the amount of the duties could not appear. And in *Good* v. *Elliott*, 3 *Term Rep.* 700. *Buller* J. remarked that the caſe of *Atherfold* v. *Beard* eſtabliſhed, that if an action *lead* to improper inquiries, it may be ſtopped *in limine*; and that the caſe could not have been decided on any other ground, becauſe the confeſſion of the Defendant excluded any actual diſcuſſion concerning the public revenue. The principal caſe however being an action on a promiſory note, nothing appeared upon record which could lead to improper inquiries, nor could any evidence upon the amount of the duties have been received.

M. TATTERSALL Adminiſtratrix of W. TATTERSALL v. GROOTE.

May 12th.

If *A.* and *B.* in conſideration of a ſum of money paid by one to the other enter into partnerſhip and covenant in caſe of a diſſolution of the partnerſhip to ſubmit all matters relating thereto, to arbitration, the arbitrators are not thereby authoriſed to determine whether any part of the ſum of money which was the conſideration of the partnerſhip ſhould be refunded.

Semb. that no action can be maintained for refuſing to nominate an arbitrator in purſuance of a covenant to refer matters to arbitration.

COVENANT. The declaration ſtated, that by an indenture dated the 2d of *January* 1797, between *G. W. Groote*, the Defendant, and *W. Tatterſall* the Plaintiff's inteſtate, reciting that in conſideration of 420*l.* paid to *G. W. Groote* by *W. Tatterſall*, *G. W. Groote* agreed to accept *W. Tatterſall* as a partner in his buſineſs of an apothecary, it was witneſſed that in conſideration of the premiſes

1800.

TATTERSALL *v.* GROOTE.

they became partners in the buſineſs aforeſaid, ſubject to the proviſoes and agreements in the indenture contained; that it was "covenanted by and between the ſaid *G. W. Groote* and *W. Tatterſall*, and *G. W. Groote* and *W. Tatterſail* deceaſed and each of them for himſelf his executors and adminiſtrators did covenant promiſe and agree to and with the other of them his executors and adminiſtrators that if at any time during that co-partnerſhip or at or after any determination thereof any variance diſpute doubt or queſtion ſhould ariſe happen or be moved between the ſaid parties or either of them their executors or adminiſtrators in for about or touching the ſaid joint concern, or copartnerſhip or any covenant agreement clauſe matter or thing therein contained or in the conſtruction thereof, or in anywiſe relating thereto, then every ſuch variance diſpute doubt or queſtion ſhould be referred to and be reſolved and determined by two indifferent perſons to be elected and choſen by the ſaid partners, that is to ſay, one by each of them within twenty days next after ſuch variance diſpute doubt or queſtion ſhould ariſe happen or be moved," with power to the arbitrators to elect an umpire in caſe of diſpute; and that each of them covenanted to abide by the determination of the arbitrators "without any further diſpute or trouble whatſoever." The declaration then averred, that on the 11th of *December* 1798, the co-partnerſhip was diſſolved by conſent, and that after ſuch diſſolution *W. Tatterſall* conceiving himſelf entitled to a return of the 420*l.* the conſideration of the co-partnerſhip, all diſputes touching the ſame were referred to the award of two indifferent perſons elected for the purpoſe by the ſaid *W. Tatterſall* and *G. W. Groote*, but that *W. Tatterſall* died before any award was made; that ſince his death the Plaintiff *Margaret Tatterſall* conceiving herſelf to be entitled to the ſaid 420*l.* as adminiſtratrix, in order to put an end to the diſpute, did within 20 days proceed to name to the ſaid *G. W. Groote* an indifferent perſon as an arbitrator on her part, and requeſted the ſaid *G. W. Groote* to name one on his part. The breach was, that *G. W. Groote* refuſed to nominate an arbitrator, whereby the Plaintiff was prevented from recovering by means of the ſaid arbitration the ſaid 420*l.* paid as the conſideration of the ſaid co-partnerſhip, and which was diſſolved without any benefit accruing thereby, either to the ſaid *W. Tatterſall* in his life-time, or to the Plaintiff as his adminiſtratrix ſince his death.

The Defendant prayed *oyer* of the indenture, by which it appeared, that *G. W. Groote* apothecary to Her Royal Highneſs the Dutcheſs

TATTERSALL *v.* GROOTE.

Dutcheſs of *York*, and *W. Tatterſall* man-midwife and apothecary, entered into partnerſhip for ſo long a time as they ſhould mutually agree, the latter paying to the former 420*l.*; that they entered into the ſeveral covenants uſually contained in articles of partnerſhip; that *G. W. Groote* then covenanted with *W. Tatterſall* not to interfere with or endeavour to turn to his own advantage that part of the practice eſtabliſhed during the co-partnerſhip which reſpected midwifery, but that *W. Tatterſall*, his executors, adminiſtrators and aſſigns, ſhould be at liberty after the diſſolution of the partnerſhip to carry on that part of the buſineſs or diſpoſe of it to their own advantage; then followed the covenant as ſet out in the declaration, for referring all matters in diſpute to arbitrators, and abiding by their award.

The defendant then demurred generally to the declaration; and the Plaintiff joined in demurrer.

Lens Serjt. in ſupport of the demurrer. 1ſt, This action is novel in its kind and cannot be maintained. The covenant on which it is founded is not ſo far binding as to ouſt the juriſdiction of the courts of common law; for it cannot be pleaded in bar to an action in thoſe courts. *Thompſon* v. *Charnock*, 8 *Term Rep.* 139. Now if it were ſo far binding as to ſubject a party to damages for not ſubmitting to arbitration, the ſame conſequence would enſue as if the party were allowed to plead it in bar. It is true that in *Halfhide* v. *Fenning*, 2 *Brown Chan. Caſ.* 336. an agreement to refer all matters in difference was allowed to be pleaded to a bill filed for a partnerſhip account; but in that caſe it was alſo agreed that they would not ſue either at law or in equity: and even this determination is much ſhaken by the ſubſequent caſe of *Mitchell* v. *Harris*, 2 *Vez.* jun. 129. Such an action as the preſent, if it could be ſupported, would be altogether fruitleſs; ſince it would be impoſſible for the jury to aſcertain the damage ſuſtained by refuſing to ſubmit to an arbitration, when it cannot appear what the reſult of ſuch an arbitration would be. 2dly, This caſe is not within the covenant, which directs that all matters relating to the co-partnerſhip ſhall be referred to arbitration, whereas the ſubject of the preſent diſpute is the original conſideration of entering into the co-partnerſhip. 3dly, By the terms of the covenant one arbitrator is to be named by each of the partners; but the Plaintiff who is executrix to one of the partners has no authority to nominate, and conſequently cannot ſue the Defendant for omitting to nominate on his part.

1800.
TATTERSALL
v.
GROOTE.

Shepherd Serjt. *contrà.* 1ſt, It is clear that an agreement to refer matters in diſpute to arbitration is not illegal. Such agreements are recogniſed and enforced by the 9 & 10 of *Will.* 3. *c.* 15. But where a man covenants to do any thing which by law he may do, he is liable to an action for non-performance of his covenant. Many things may be the ſubject of an action of covenant though the reſult of the deciſion would require a further inveſtigation. Thus if a man covenant to account, an action may be maintained on his refuſal to do ſo; yet a ſubſequent action would be neceſſary to recover the balance of the account. Whatever difficulty may be found in aſcertaining the damage, the only queſtion now is, Whether the action be not maintainable? 2d, Nothing can be larger than the expreſſions of this covenant. The terms upon which the partnerſhip ſhould be diſſolved is clearly within the meaning of them. It is poſſible that the propriety of reſtoring the 420*l.* or a proportionable part of it, might be the foundation of a ſuit in equity; as if ſome fraud had been practiſed in the formation of the partnerſhip. If therefore this queſtion could be the foundation of a ſuit in equity, it was clearly a proper ſubject for arbitration. 3dly, The Court will ſo conſtrue the covenant as to give effect to the intention of the parties. The words of the covenant reſpect any difference which ſhall be moved between the ſaid parties or either of them, their executors or adminiſtrators; it would therefore be abſurd to confine the agreement to nominate arbitrators to the partners themſelves.

Lord ELDON, Ch. J. (after ſtating the caſe). Theſe articles purport to be an agreement between two gentlemen converſant in the different branches of the medical profeſſion; and one of them has thereby decided for himſelf, that it was worth his while to give 420*l.* to the other on the eſtabliſhment of a joint concern. It was competent to him to decide on the prudence of ſuch a meaſure, taking into conſideration the probability of the connection being of long continuance or not. It is very evident from the covenant which provides that the practice of midwifery ſhall belong wholly to Mr. *Tatterſall*, after the diſſolution of the partnerſhip, that he might derive a ſufficient inducement for entering into it from the hope of being ſoon able to eſtabliſh his character in that branch, and then to diſſolve the partnerſhip and ſet up for himſelf. He declined entering into articles for a definite period of time; we may therefore lay out of the caſe the whole doctrine of

TATTERSALL
v.
GROOTE.

of equity reſpecting agreements between maſters and apprentices, where part of the conſideration has been reſtored to the latter on the ground of its having been paid with a view to ſome continued benefit which has been interrupted by ſome unexpected event. The caſe has been argued on theſe grounds. I ſhall firſt conſider the ſecond, and on that point I am clearly of opinion that the caſe is not within the articles. See how it ſtands. In conſideration of 420*l.* to be paid by Mr. *Tatterſall*, the parties agree to enter into the articles. The covenant to refer matters to arbitration in point of conſideration, is ſuſtained by the payment of 420*l.* and yet by virtue of that very covenant it is now made a matter of diſpute, whether the 420*l.* ought to have been paid or not. Courts of equity will interfere in caſes where fraud has been practiſed, and order the conſideration to be returned; but then they treat the articles as a nullity in conſequence of the fraud; whereas here the parties apply to a court of law to enforce a covenant in the articles, becauſe they are binding. Large as the words are, I do not think that they authoriſe a demand of an arbitration on the point, whether the conſideration of the articles ſhould have been paid or not. With reſpect to the third point, I do not feel that we are bound to ſtruggle to make ſenſe of the terms which the parties have uſed. It can hardly be doubted that the parties meant to extend the power of nomination to their executors and adminiſtrators; but the words are "partners and each of them." Now there is no ſufficient reaſon in this caſe for extending thoſe words beyond their obvious ſenſe. On theſe two laſt grounds therefore I am clearly of opinion that judgment muſt be given for the defendant.

With reſpect to the firſt point, if it were neceſſary to give an opinion I ſhould wiſh to take time to conſider of it. This is quite clear, that there is no inſtance of ſuch an action as the preſent having ever been brought in a court of law, and it is equally clear that though courts of equity will decree the ſpecific performance of reaſonable covenants where ſubſtantial damages cannot be obtained in a court of law, yet no man, I apprehend, ever heard of a ſuit in Equity to compel the ſpecific performance of a covenant to refer diſputes to arbitration. In *Wellington* v. *Mackintoſh*, 2 *Atk.* 569. Lord *Hardwicke* overruled a plea of covenant to refer matters in difference which was pleaded to a bill for a diſcovery. Lord *Kenyon*, indeed, in *Halfhide* v. *Fenning*, ſupported ſuch a plea;

but then the words there were, "before they brought any ſuit." I think I do not miſconſtrue the caſe of *Mitchell* v. *Harris*, by ſtating that the opinion of Lord *Loughborough* did not agree with the doctrine laid down in *Halfhide* v. *Fenning*. In the diſcuſſion of *Mitchell* v. *Harris*, the counſel were aſked by the Lord Chancellor if an action like the preſent had ever been known in a court of law, and it was admitted that no inſtance was to be found. It would be difficult to direct a jury upon what rule to proceed in aſſeſſing damages in ſuch an action; for *non conſtat* that the Plaintiff would have ſucceeded in the arbitration. The covenant therefore ſeems nugatory, or if not ſo, yet it cannot be enforced as tending to exclude the juriſdiction of the courts.

HEATH J. I am of the ſame opinion. If it were neceſſary to decide the caſe upon the firſt ground, I ſhould wiſh to conſider it more fully. It appears to me, however, that the covenant is tantamount to a covenant to forbear ſuing. Indeed it does not appear upon theſe pleadings that the Plaintiff is entitled to the 420 *l.* whereas he was bound to make out a title to recover it. Thus in an action for not accounting, the plaintiff muſt ſhew that the defendant has received a certain ſum of money; otherwiſe no legal difference appears between them. In the ſame manner an action can never lie for not going before an arbitrator unleſs it appear that there is a fair ſubject of arbitration. By the words of the covenant in the preſent caſe, the power of nominating arbitrators is confined to the partners themſelves.

ROOKE J. On the firſt objection the inclination of my opinion is, that the covenant is futile: but it is not neceſſary to decide that point. On the two laſt grounds I am of opinion that judgment ſhould be given for the Defendant.

Judgment for the Defendant.

MURPHY *v.* CADELL.

May 13th.

The Court will not ſtay proceedings in an action, on the ground of a bill depending in chancery for the ſame cauſe.

THIS was an application to ſtay proceedings in an action in this Court, on the ground of the Plaintiff having filed a bill in Chancery againſt the Defendant for a diſcovery and an account, reſpecting the very matters for which he was purſuing his remedy here.

Cockell Serjt. ſhewed cauſe againſt the rule, and cited *Jones* v. *Clay*, *ante*, vol. 1. p. 191. where the Court refuſed to compel a party to elect whether he would proceed by indictment or action for the ſame cauſe.

Shepherd Serjt. argued in ſupport of the rule.

But *the Court* were of opinion they could not interfere, obſerving, that poſſibly the Defendant might be in contempt in Chancery for having put in an inſufficient anſwer.

Rule diſcharged without coſts.

PAYNE *v.* WHALEY.

May 13th.

Allowance of a writ of error may be ſerved before the plaintiff is entitled to ſign final judgment.

BEST Serjt. having obtained a rule *niſi* for ſetting aſide a *fieri facias* in this caſe and all proceedings thereon, as being ſubſequent to the allowance of a writ error;

Bayley Serjt. ſhewed cauſe and contended that the allowance of the writ of error was irregular, inaſmuch as it ſerved before the Plaintiff was entitled to ſign final judgment.

But *the Court* held the allowance regular (*a*).

Rule abſolute.

(*a*) Vid. *Gravall* v. *Stimpſon*, vol. 1. p. 479. for what is ſaid on this ſubject by *Eyre* Ch. J.

THOMPSON *v.* JORDAN.

May 14th.

If the writ by which a replevin is removed be returnable on the firſt return of the term, and the Plaintiff do not declare within four days before the end of that term, the Defendant is entitled to an imparlance; though he has not appeared within the term.

THIS was a rule obtained by *Lens* Serjt. calling on the Plaintiff to ſhew cauſe why the interlocutory judgment, and all ſubſequent proceedings thereon, ſhould not be ſet aſide for irregularity with coſts.

The Defendant having diſtrained upon the Plaintiff for rent, the latter replevied the goods, and on the 16th of *December* 1799

1800.
THOMPSON
v.
JORDAN.

removed the action of replevin into this Court by a writ of *accedas ad curiam* (*a*), returnable on the firſt return of *Hilary* term (*Jan.* 20), 1800. Previous to the return of this writ it was ſhewn to the Defendant's attorney who undertook to appear: but on the 22d of *January* no appearance having been entered, the Plaintiff ruled the Defendant to appear in four days, and on the 4th of *February* the Plaintiff's attorney gave notice to the Defendant's attorney that the writ of *accedas ad curiam* had been returned and filed, and demanded that an appearance ſhould be entered, adding, that unleſs an appearance were entered a *diſtringas* would iſſue. On the 8th of *February* no appearance having been entered, the Plaintiff ſued out a *diſtringas* returnable on the laſt return of *Hilary* term (*Feb.* 12). On the 14th of *February*, being two days after the expiration of *Hilary* term, the Defendant entered an appearance, and on the ſame day a declaration was delivered, and a rule to avow ſerved on the Defendant; which rule not having been complied with, interlocutory judgment was ſigned. The objection to the regularity of the judgment was, that as the writ of *accedas ad curiam* was returnable on the firſt return of *Hilary* term, and the declaration was not delivered until two days after the end of that term, the Defendant was intitled to an imparlance.

Beſt Serjt. now ſhewed cauſe, and admitted, that as the Plaintiff inſtead of enforcing the undertaking of the Plaintiff's attorney had proceeded by *diſtringas*, the caſe muſt be conſidered as if no ſuch undertaking had been made; but he contended, that as the Plaintiff had been prevented from declaring within four days before the end of *Hilary* term by the Defendant neglecting to appear, the latter was not entitled to an imparlance. He cited *Rooke* v. *The Earl of Leiceſter*, 2 *T. R.* 16. & 1 *Sellon Prac.* 268.

(*a*) This writ is only a ſpecies of *recordari facias loquelam*, and is employed when "a "replevy is ſued by plaint in the court of "any other lord than in the county court "before the ſheriff." By this writ the ſheriff is directed to go to the court of the lord, and there record the plaint; whereas the the common *recordari facias loquelam* directs him to record that plaint which is in his own court. *F. N. B.* 70. *B.* Where the replevin is by writ out of Chancery, either in the county court or in the court of a lord of a Hundred, &c. it muſt be removed by *Pone*. *F. N. B.* 69, *M.* 70. *A.* *Et ſciendum eſt quod* Recordare *vel* Pone *pro defendente ſemper debet fieri cum cauſâ, ſive loquela ſit in curia regis ſive alterius. Et ſi loquela ſit in curia Wapentachii Hundredi*, &c. *alterius magnatis, ſemper inſerenda eſt cauſa, ſive fuerit pro petente ſive pro defendente. Si autem loquela fuerit in aliquâ curiâ regis non fiat pro petente cum cauſâ, ſed pro defendente ſic. Reg. Orig.* 85. *b. Vide etiam*, 2 *Inſt.* 339. There is alſo an *accedas ad curiam* where falſe judgment has been given in a Hundred court, court baron, &c. *F. N. B.* 18. *A. B.* And if juſtice be delayed in the little writ of right, the demandant ſhall have a writ *quod vicecomes accedat in propria perſona ſua ad curiam*, &c. *ad videndum quod plena juſtitia exhibeatur*, &c. *Reg. Orig.* 9. *b.*

But *the Court* (after conſulting the officers) were of opinion, that the exception (*a*) contended for did not apply to the action of replevin; and that the Defendant therefore was entitled to an imparlance.

Rule abſolute without Coſts.

(*a*) Vid. *Bayley* v. *Hantler, ante,* p. 126. and the caſes there referred to.

(In the EXCHEQUER CHAMBER.)

Lord Petre *v.* Lord Auckland and Lord Gower, Poſtmaſter-General; in Error.

May 14th.

A Roman Catholic peer is not entitled to frank.

This was an action of *indebitatus aſſumpſit* for money had and received; and was tried before Lord *Kenyon* at the *Guildhall* ſittings after laſt *Michaelmas* term, when his Lordſhip having directed the jury to find a verdict for the Defendants, a bill of exceptions was tendered. A verdict having been found for the Defendants, and judgment given in the *King's Bench* accordingly, a writ of error was brought, and the common errors aſſigned. From the bill of exceptions, when ſealed and annexed to the record, the caſe appeared to be in ſubſtance as follows:—That Lord *Petre* before and at the time of the receipt of the ſum of ſevenpence hereinafter mentioned, was a peer of *Great Britain*, by hereditary deſcent from his anceſtor *John Petre*, who was created by letters patent of the 21ſt *July* 1603, Baron *Petre* of *Writtle* in the county of *Eſſex*, to hold to him and his heirs male; that the anceſtors of Lord *Petre* enjoying the ſaid honour and dignity, have always been ſummoned to parliament in right of the ſaid dignity; and that Lord *Petre* long before the demand and receipt of the ſaid ſum of ſevenpence hereinafter mentioned, *viz.* on the 30th of *May* 1796, (he being then of the age of 21 years and upwards,) was duly ſummoned to the preſent parliament in right of his ſaid dignity; that Lord *Auckland* and Lord *Gower* before and at the time of the demand and receipt of the ſum of ſevenpence hereinafter mentioned were his Majeſty's poſtmaſter-general, and as ſuch, on, &c. at, &c. (being during the ſitting of the preſent parliament,) demanded, charged, and received of and from Lord *Petre* the ſum of ſevenpence for the poſtage of a ſingle letter, ſent and conveyed by the poſt from *Briſtol* to *London*, being a diſtance exceeding 100 miles, and leſs than 150 miles, and which letter

was

1800.

Lord Petre *v.* Lord Auckland, *&c.*; in Error.

was directed to Lord *Petre* at his houſe in *London*, being the place of his uſual reſidence, the ſame being the only letter ſent and conveyed to Lord *Petre* by the poſt on that day; that from the paſſing of the 30 *Car.* 2. *ſt.* 2. made to prevent papiſts from ſitting in parliament, the privilege of ſending and receiving letters free from poſtage has been enjoyed by all peers not profeſſing the Roman Catholic religion who have been ſummoned to parliament, although they have not taken or offered to take their reſpective ſeats in the Houſe of Lords; that Lord *Petre* is and was at the time when, *&c.* a Roman Catholic, and never appeared in parliament in purſuance of his ſummons, or voted, or made his proxy in the Houſe of Peers, or ſat there during any debate, or offered to do ſo; and that he has never ſubſcribed or repeated the declaration mentioned in the 30 *Car.* 2. *ſt.* 2. but that he has taken, made, and ſubſcribed the declaration and oath mentioned in the 31 *Geo.* 3. *c.* 32. made to relieve papiſts from certain penalties; that ſince the paſſing of the 30 *Car.* 2. *ſt.* 2. the ſending and receiving letters free from poſtage has not been enjoyed by any peer profeſſing the Roman Catholic religion, although actually ſummoned to parliament; that the ſaid privilege has never been enjoyed by any peereſs being ſuch in her own right, or by marriage, or by any peer under 21, nor have they ever been ſummoned to parliament; that ſince the union of *England* and *Scotland*, no peer enjoying his dignity only by reaſon of his own poſſeſſion before the union, or by hereditary deſcent, and who has not been one of the ſixteen peers, has enjoyed the ſaid privilege; that the ſaid privilege was, before the 4 *Geo.* 3. 24. enjoyed by ſuch peers as did in fact enjoy the ſame under certain warrants from time to time iſſued under the King's ſign manual, in which warrants they were exempted from poſtage by the name and deſcription of the members of both houſes of parliament; that in ſome of theſe warrants the exemption was expreſſed to be during the ſitting of parliament only, in others which were iſſued immediately before the 4 *Geo.* 3. *c.* 24. the exemption was expreſſed to be granted to the members of both houſes of parliament during every ſeſſions of parliament, and for forty days before, and forty days after every ſeſſions; that on the 16th of *April* 1735, the commons of *Great Britain* reſolved that the privilege of franking letters by the knights, citizens, and burgeſſes, choſen to repreſent the commons in parliament, began by erecting a poſt-office within this kingdom by act of parliament, and that all letters not exceeding two ounces, Lord PETRE *v.* Lord AUCKLAND, *&c.*; in Error.

ſigned by the proper hand of or directed to any member of that Houſe, during the ſitting of every ſeſſion of parliament, and forty days before and forty days after, every ſummons and prorogation ought to be carried and delivered freely and ſafely from all parts of *Great Britain* and *Ireland* without any charge of poſtage.

Jervis for the Plaintiff in error. The queſtion in this caſe depends upon the conſtruction of 4 *Geo.* 3. *c.* 24., by which it is enacted, that no letter ſhall be exempt from poſtage except ſuch as are therein excepted; the exception applicable to this point is, "all letters and packets not exceeding the weight of two ounces, ſent from and to any places within the kingdoms of *Great Britain* or *Ireland* during the ſitting of any ſeſſion of parliament, or within forty days before or forty days after any ſummons or prorogation of the ſame, which ſhall be ſigned on the outſide thereof by *any member* of either of the two houſes of parliament of *Great Britain*, and whereof the whole ſubſcription ſhall be of the handwriting of ſuch member, or which ſhall be directed *to any member* of either houſe of Parliament of *Great Britain*, or at any of the places of his uſual reſidence, or at the place where he ſhall actually be at the time of the delivery thereof, or at the houſe of parliament, or at the lobby of the houſe of parliament *of which he is a member*." The ſubſequent ſtatutes regulating the number and weight of letters do not vary the effect of the above clauſe upon the preſent caſe. From the bill of exceptions it appears, that the Plaintiff is *a member* of one of the houſes of parliament. It is ſtated that he is a peer of the realm by deſcent, and he is not only entitled *ex debito juſtitiæ* to his writ of ſummons 4 *Inſt.* 1. but has actually received it for the preſent parliament. Neither the 30 *Car.* 2. *ſtat.* 2. nor 31 *Geo.* 3. *c.* 32. contain any thing to negative a Roman Catholic peer being a *member* of the Houſe of Lords. Indeed the inference from the former of thoſe acts is directly the reverſe, for it provides that "no perſon that now is or hereafter ſhall be a peer of this realm, *or member of the Houſe of Peers*, ſhall vote, *&c.* until he ſhall have taken certain oaths and ſubſcribed a certain declaration;" the act, therefore, ſeems to conſider that a perſon may be a *member of the Houſe of Peers* previous to his having taken the oath. If then the Plaintiff be a *member* of the Houſe of Peers, he is entitled to the exemption under 4 *Geo.* 3. *c.* 24. That exemption is not confined to the peers in any particular predicament, ſince no mention is made of any religious perſuaſions, but the deſcription is general. No

1800.

Lord PETRE *v.* Lord AUCKLAND, &c. in Error.

analogy can be drawn from peereſſes or peers under age, or *Scotch* peers not of the ſixteen, becauſe they are not entitled to ſit at all, not receiving a writ of ſummons. But the Plaintiff has an unqueſtionable right to go into the houſe and take his ſeat and vote at any moment during the ſeſſion, provided he take the oaths; and is therefore preciſely in the ſame ſituation as any other peer, who having received his writ of ſummons, is prevented by illneſs or any other occaſional diſability from taking his ſeat. It is further to be obſerved, that as the exemption commences forty days previous to the ſitting of parliament, it is impoſſible to aſcertain whether the perſons who claim the exemption mean to take the oaths or not. The right to the exemption, therefore, cannot depend upon their taking the oaths.

Abbott for the Defendants. If it could be aſſumed that every peer is a member of parliament, no further argument would be neceſſary on the part of the Plaintiff. On that point the whole queſtion turns; and though the Plaintiff be at liberty to become a member of parliament whenever he may think proper, yet he was not ſo at the time when the letter ſtated in the bill of exceptions was ſent. The legiſlature ſeems to have made a diſtinction between privilege of peers and privilege of parliament. Had it been intended that every peer ſhould be equally entitled to the right of franking, the expreſſions of the act would have been, "any peer of the realm, and any member of the Lower Houſe of Parliament;" whereas the words of the act are, "any member of either houſe of parliament of *Great Britain*." The ſame expreſſions are uſed in the 24 *Geo.* 3. *ſeſſ.* 2. *c.* 37. & 35 *Geo.* 3. *c.* 53. *ſ.* 1, 2, 3. and are taken from the royal warrants which were in uſe previous to the 4 *Geo.* 3. *c.* 24. Beſides, the act ſeems to conſider the privilege as granted in conſequence of the legiſlative functions of the perſon to whom it is given; ſince it directs in *ſ.* 5. that the votes and proceedings of parliament ſhall be free of poſtage; and the firſt ſection clearly contemplates the perſon entitled to the privilege as attendant upon his duty in parliament, which ſpeaks of letters directed to him "at the houſe of parliament, or the lobby of the houſe of parliament of which he is a member." And the ſubſequent ſtatute (*a*) which has limited the number of letters which are to paſs free of poſtage, appears alſo to have had in view the number of letters which any member of

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(*a*) 35 *Geo.* 3. *c.* 53.

parliament could be ſuppoſed to ſend or receive in his official capacity. In farther confirmation of the diſtinction between privilege of peerage and privilege of parliament, it may be remarked, that peereſſes, though entitled to freedom from civil arreſt, and to a trial by the peers of the realm, are not entitled to the privilege of franking. It is alſo obſervable, that in the act of union, 5 *Ann.* *c.* 8. *Art.* 23. "all privileges of parliament" are ſecured to the ſixteen peers of *Scotland*, which are enjoyed by the peers of *England*, and that to the other peers of *Scotland* are ſecured "all privileges of peers," as fully as they are enjoyed by the peers of *England*, "except the right and privilege of ſitting in the Houſe of Lords, and the privileges depending thereon." A member of the Houſe of Commons, diſabled by the 30 *Car.* 2. *ſtat.* 2. is no longer a member, and therefore it is provided that his place ſhall be filled up: this proviſion cannot indeed apply to peers who are not elected; but by a parity of reaſoning, when they are diſabled, they are no longer members of the houſe. Uſage, if it may be taken into conſideration at all, ſtands directly in oppoſition to the Plaintiff's claim. Upon the whole therefore, the writ of ſummons ſeems only to confer an inchoate right to become a member of parliament, for it is abſurd to contend that any one can be deemed a member of an aſſembly, which he cannot enter during a debate, and in which he can neither ſit or vote without incurring penalties.

The Court took time to conſider of their opinion, which was on this day delivered by

Lord ELDON Ch. J. The queſtion is, Whether, under the circumſtances of this caſe, Lord *Petre* was entitled to receive the letter in queſtion free of poſtage? If he was entitled to receive it free of poſtage, it appears from the record that the money in demand was paid by miſtake, and Lord *Petre* will be entitled to recover it in this action. Since the paſſing of the 4 *Geo.* 3. *c.* 24. which has converted what was before a privilege into what may now be called a legal right, that is a right under an act of parliament, no doubt can be entertained of the Plaintiff's right to ſue in this form of action; though previous to the paſſing of that act, when the exemption was allowed under warrants from time to time iſſued by the crown, operating as grants of part of the duties veſted by parliament in the crown for its own uſe, ſome doubts might have been entertained upon the ſubject, the money

having

Lord PETRE *v.* Lord AUCKLAND, *&c.*; in Error.

having been paid over to his Majeſty's uſe. We are now to decide the queſtion on the true conſtruction of the 4 *Geo.* 3., the title of which is, "An act for preventing frauds and abuſes in relation to the ſending and receiving of letters and packets free from the duty of poſtage." The preamble of that act ſtates, that "under colour of the privilege of ſending and receiving poſt-letters by members of parliament free from the duty of poſtage many great and notorious frauds have been and ſtill are frequently practiſed, as well in derogation of the honour of parliament as to the detriment of the public revenue, divers perſons having preſumed to counterfeit the hand, and otherwiſe fraudulently to make uſe of the names of members of parliament upon letters and packets to be ſent by the poſt in order to avoid the payment of the duty of poſtage." In conſtruing theſe words we ſhould be extremely at a loſs to find what expoſition ſhould be put upon them, unleſs we were informed by the record of the true meaning of the expreſſion, "privilege of ſending poſt-letters by members of parliament free from the duty of poſtage." It is not an expreſſion which neceſſarily implies that the privilege was enjoyed by all members of parliament, nor does it ſhew what were the origin, nature, reſtrictions, limitations, or extenſions in practice or uſage of that privilege. In this Court therefore, not underſtanding privilege of parliament, we are obliged to look at the record to enable us to underſtand the act. The record contains what out of this place we know to be the ſubſtance of the parliamentary hiſtory of this privilege. It is not ſtated however by whom this privilege was enjoyed between the years 1660 and 1678; and it is not our province to infer from what is ſtated to have been the uſage ſubſequent to the year 1678, what was the uſage between 1660 and that year. But the record has ſtated that from the year 1678 the privilege has been enjoyed by all peers not profeſſing the Roman Catholic religion, and that it has not been enjoyed by any peer profeſſing that religion. In 1660, when parliament (*a*) adopted the ſcheme for erecting a poſt-office, which had been firſt introduced during the uſurpation by the act of 1656 (*b*), the duty of poſtage was impoſed generally on all his Majeſty's ſubjects. We know hiſtorically, though we cannot take judicial notice of it, that a clauſe was propoſed in the commons to exempt "the

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(*a*) Vid. 12 *Car.* 2. *c.* 35. *Ruffhead's* Statutes, Appendix, p. 175.

(*b*) See *Scobell's* acts, p. 511. *Anno* 1656. *c.* 30.

1800.

Lord PETRE *v.* Lord AUCKLAND, &c.; in Error.

knights, citizens, and burgeſſes choſen and continuing to be members of the parliament of *England* and ſitting the parliament from the duty of poſtage (*a*)." We know alſo that the propoſition was entertained with conſiderable doubt; that it was treated by ſome as a mendicant clauſe, and that the ſpeaker was very unwilling to put the queſtion upon it (*b*). However it paſſed the Houſe of Commons (*c*). But as it contained no proviſion for the members of the Houſe of Lords, and as that houſe could make no addition to a money bill, the clauſe was there omitted (*d*). The omiſſion occaſioned ſome difficulty in the Houſe of Commons with reſpect to the paſſing of the bill; to facilitate which his Majeſty's miniſters gave aſſurances to the members of the Houſe of Commons that their letters ſhould paſs free. Accordingly, on the 14th of *May* 1661, a warrant was iſſued by King *Charles* the Second, which is to be found in the Commons' Journals, vol. 22. p. 463. (*e*) to this effect: "*Charles* R. The King being informed by his principal ſecretaries of ſtate that the members of parliament ſeemed unwilling to pay for the poſtage of their letters during the ſitting of parliament, his Majeſty was thereupon graciouſly pleaſed to give directions to the farmers of his poſt-office that all ſingle letters, but not packets, ſent by the poſt-office to or from any member of either houſe of parliament go free without payment of any thing for the poſt thereof." What effect was actually given to the exemption directed by this warrant between the years 1661 and 1678 we have no means of knowing from this record: but the record ſtates, that from the year 1678 no peer profeſſing the Roman Catholic religion, whether conſidered as a member of parliament, or as a mere peer contradiſtinguiſhed from a member of parliament, ever did enjoy the privilege. On the

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(*a*) *December* 16th, 1660, *Comm. Journ.* vol. 8. p. 212.

(*b*) Vide *Parliamentary Hiſt.* vol. 23. p. 56.

(*c*) The bill was agreed to by the Commons and ſent to the Lords for their concurrence, *December* 20th, 1660, *Comm. Journ.* vol. 8. p. 217, 218.

(*d*) The bill came to the Lords on the 21ſt of *December* 1660, and was on the ſame day twice read, and referred to a committee on the bill for poll money. *Lords' Journ.* vol. 11. p. 220. On the evening of the ſame day the committee reported it fit to paſs with "ſome few amendments," which having been twice read, and agreed to, the bill with the amendments was read a third time and paſſed. *Lords' Journ.* vol. 11. p. 222. On the 22d of *December* 1660, the Commons received the bill with a meſſage from the Lords, deſiring their concurrence in the alterations; and on the ſame day "the amendments to the bill taking away the proviſo about letters to members of parliament" were read and agreed to; and the bill ſent back to the Lords. *Comm. Journ.* vol. 8. p. 223.

(*e*) Where the ſubſtance of the above facts is ſtated in the report of a committee appointed by the houſe in 1736 to conſider the ſubject.

1800.

Lord Petre *v.* Lord Auckland, &c. in Error.

19th of *February* 1734, the copy of a warrant allowing letters to paſs free of poſtage, dated the 18th of *October* 1727, and directed to the poſtmaſter-general, was preſented to the houſe (*a*), purſuant to an order of the houſe (*b*); by which it appears that the form of the warrant at that time varied from what it was in 1661. After reciting that the revenue had been greatly prejudiced by the free carriage of letters which ought to have been paid for according to the acts of parliament in that behalf, it directs the poſtmaſter-general not to permit any perſon to ſend or receive free any letters which ought to be paid for by the ſaid act, except, among other exceptions, "the members of both our houſes of parliament during every ſeſſion of parliament, and for forty days before and forty days after every ſeſſion, ſo as the ſaid letters or packets to be franked by virtue of this our authority for the members of parliament of either houſe do not exceed the weight of two ounces." It concludes, "and we do alſo will and require you to make our pleaſure known to the members of our ſaid houſes of parliament, that for preventing the above abuſes which, as we have been informed have been frequently practiſed with divers perſons who not being members of either of the ſaid houſes of parliament have yet preſumed to indorſe on their letters the names of ſuch as were, as alſo to direct their letters to members of parliament when at the ſame time ſuch letters do not really belong to or concern the members to whom the ſame are directed, we do expect that the members of both houſes do conſtantly indorſe their own names on their own letters with their own hand-writing and that they do not ſuffer any letters whatſoever other than ſuch as concern themſelves to paſs under their frank cover or direction, to the diminution and prejudice of our ſaid revenue. And for ſo doing this ſhall be your warrant (*c*)." This warrant, which reſtrained the generality of the exemption by requiring that the letters which were to go free of poſtage ſhould have a particular addreſs and be confined to a certain weight, appears to have been entertained by the Houſe of Commons as a matter, the propriety of which was to be inquired into. If the privilege under the old warrants were general, the houſe ſeemed to think that it ought not to be limited without their conſent. Accordingly a committee was appointed on the 26th of *February* 1734 to take the copy of

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(*a*) See *Comm. Journ.* vol. 22. p. 385.

(*b*) Seventeenth *February* 1734. *Comm. Journ.* vol. 22. p. 382.

(*c*) *Comm. Journ.* vol. 22. p. 393.

1800.

Lord PETRE
v.
Lord AUCKLAND, *&c.* in Error.

the warrant into conſideration (*a*); and in *April* 1735 various reſolutions were paſſed concurring in the meaſures for preventing frauds ſuggeſted in the warrant (*b*). Among theſe reſolutions was that ſtated at the end of the ſpecial verdict. Since theſe reſolutions and this warrant which concerned the members of both houſes of parliament, no peer profeſſing the Roman Catholic religion, as we are informed by the record, has *de facto* enjoyed the privilege. In the year 1764 previous to the paſſing of the 4 *Geo.* 3. the Houſe of Commons again took the matter into their conſideration (*c*) as a matter of privilege, and entered into ſeveral reſolutions, the firſt of which relates to the practice of counterfeiting the hands of members of the houſe; and they ſuggeſt ſeveral wholeſome regulations for preventing the abuſes which had prevailed. They then ſend a meſſage to the Lords, not deſiring their concurrence as in caſes of legal regulation, but for the purpoſe only of communicating their reſolutions: the ſubject is entered into by the Houſe of Lords, and reſolutions are there paſſed (*d*), the firſt of which is in *ipſiſſimis terminis* the ſame with that entered into by the commons; and ſtates that the practice of counterfeiting the hands of "members of this houſe" is become frequent. The reſolutions of both houſes being framed, the act of 4 *Geo.* 3. is brought in, after which the houſe proceeds in its communications by meſſage (*e*) deſiring the concurrence of the Lords. The preamble of that act, which has been already ſtated, uſes the expreſſion "members of parliament," the very expreſſion of the royal warrant, and deſcribes the fraud to be provided

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(*a*) It is to be remarked that on the 9th of *September* 1715, (*Comm. Journ.* vol. 18. p. 303.) the Houſe of Commons, on complaint made of great abuſes in the privilege of franking, came to reſolutions regulating the exerciſe of that privilege in a manner ſimilar in many reſpects, to that afterwards adopted; and that on the 23d *March* 1716-17, a warrant was iſſued by the crown, couched almoſt verbatim in the ſame terms as that which iſſued in the firſt year of the reign of *George* the Second, *viz.* 18th of *October* 1727, and which the Houſe of Commons thought it neceſſary to take into their conſideration in 1734. A copy of the warrant of the 23d *March* 1716-17, is printed in the Appendix to a report of this Caſe publiſhed by Mr. *Dillon.*

(*b*) *Comm. Journ.* vol. 22. p. 464, 5. 472. 476.

(*c*) Committee appointed *March* 1ſt 1764. *Comm. Journ.* v. 29. p. 893. Report and reſolutions of the committee 28th *March*, p. 997, 998. Reſolutions agreed to and orders made upon the members regulating the exerciſe of the privilege and a meſſage ſent to Lords communicating the ſame 28th *March*, p. 1002.

(*d*) *March* 29th, 1764. *Lords Journ.* v. 30. p. 531, 2, 3, 4. Communicated to the Commons on the ſame day. *Comm. Journ.* v. 29. p. 1010. Ordered that a bill be brought in, ſame day, p. 1011.

(*e*) Bill paſſed in the Commons and meſſage to the Lords deſiring their concurrence, *April* 11th 1764. *Comm. Journ.* v. 29. p. 1047.

againſt to be, the practice of counterfeiting their hands. The fraud therefore, was one which could not be practiſed upon thoſe who, according to the exerciſe of the privilege then prevailing, had not been in the habit of franking letters to any perſon whatſoever. The queſtion in this caſe cannot accurately be ſaid to depend upon uſage, otherwiſe than as that uſage was the ſubject of the act of parliament. I agree that if the expreſſion "members of parliament" in the enacting clauſe of the ſtatute, muſt be underſtood to include all members of parliament, or all peers who ſtand in the predicament in which the record ſtates Lord *Petre* to be, we ſhould not be authorized to give judgment for the Defendant. But the true queſtion ſeems to be, whether the act muſt not be taken to be an act regulating the privilege, as that privilege was exerciſed at the time when the act paſſed. If the privilege were a privilege of ſuch members of the Houſe of Peers (taking all peers to be members of parliament) as did not profeſs the Roman Catholic religion, the queſtion is, whether the act muſt not be taken to be an act regulating the privilege of peers not profeſſing that religion; or whether we are to underſtand that notwithſtanding the act was paſſed to reſtrain the right of franking, yet that its operation was intended to be ſuch as to enlarge that privilege and confer it upon thoſe who had it not before? Underſtanding from this record what was the privilege of members of parliament at the time when the act paſſed, we are all of opinion that the act muſt be taken to regulate the privilege with reſpect to thoſe by whom it was enjoyed at that time, and not to enlarge the number of thoſe who were to exerciſe it in future. When I ſay members of parliament, I wiſh not to be underſtood as giving any opinion whether Lord *Petre* be or be not entitled to be conſidered a member of parliament. There is a great difference between privilege of peerage and privilege of parliament. But I think the caſe of Lord *Petre* in the preſent inſtance ſtands on the ſame ground as if a writ of ſummons had been delivered improvidently to a proteſtant peer during his minority. The minority in ſuch caſe would operate an incapacity againſt his ſitting in parliament, and I do not know how we are to account for the facts in this record, unleſs we conſider the Roman Catholic peers ſince 1678, as under a diſability ſimilar in effect to that which ariſes from the minority of a proteſtant peer. If a minor peer were to receive a writ of ſummons and demand to have his letters free of poſtage, the poſtmaſter-general would only have to prove the fact of the minority in order to eſtabliſh that ſuch a peer was not entitled to the privilege of parliament; though clearly entitled to privilege of peerage. In the caſe of a Roman Catholic peer having received a writ of ſummons, as he could not take the oaths directed by 30 *Car.* 2. he could no more be a peer of parliament than a proteſtant peer during his minority. And I take it that the privilege now in diſpute muſt have been withheld from the one on the ſame ground as from the other, *viz.* that the privilege is connected with the capacity of doing buſineſs in parliament. How far the privilege has been abuſed will not affect the juſtneſs of the reaſoning upon principle. But in all the acts which have given the liberty of franking and receiving letters free from poſtage to public officers, it is expreſsly given in reſpect of the buſineſs of the offices in which they are employed. I do not aſſent to the argument, that becauſe Lord *Petre* is entitled to privilege of peerage, therefore he is entitled to privilege of parliament. It is not neceſſary for us to decide whether his Lordſhip be a member of parliament or not; but if it were neceſſary, I will not pretend to ſay but that there are many acts of parliament containing expreſſions ſuch as "Lords of Parliament," and "Lords of the Houſe of Parliament," which would apply to any peer before he has taken his ſeat. But, as it ſeems to me, the true ground upon which the conſtruction of the 4 of *Geo.* 3. is to be put is this; that the right of members of parliament under the act, is the ſame with the privilege allowed by the houſes of parliament to be exerciſed by their members previous to the paſſing of the act; that this privilege (which is not ſtated in the act to be the privilege of *all* members of parliament,) was then enjoyed by peers, (members of parliament if you chooſe ſo to call them,) not profeſſing the Roman Catholic religion; that the enacting clauſe of the ſtatute when it ſpeaks of members of parliament, means ſuch members of parliament as are mentioned in the preamble, that is members of parliament who independently of the act, were entitled to the privilege which the act intended to regulate; that the object of the act was, that ſuch members ſhould continue to exerciſe their privilege ſubject to certain regulations; and the object of the act being to regulate and reſtrain the privilege where it was, it could not be intended to give the privilege where it was not. Being informed by the record what the meaning of "privilege of ſending and receiving poſt-letters by members of parliament free from the duty of poſtage," was

1800.

Lord Petre *v.* Lord Auckland, *&c.*; in Error.

the time when the 4 *Geo.* 3. was paſſed; we are all of opinion that the enacting clauſe can only extend to thoſe who being members of parliament had the privilege independent of the act.

Per Curiam. Judgment affirmed.

May 15th.

Faulkner and others *v.* Wise.

It is not a ſufficient ground for rejecting a perſon as bail, that he is deſcribed to be "of *A.* in "the county "of *B.*, "gaol-keeper."

One of the bail in this caſe (who were to juſtify by affidavit,) having been deſcribed as "of *Banbury* in the county of *Oxford*, gaol-keeper," was oppoſed on that account by *Runnington*, Serjt. who obſerved that the Court had refuſed to allow perſons in that ſituation to become bail.

But *the Court* thinking that the rule did not extend to this caſe, inaſmuch as it did not appear that the bail was the county gaol-keeper, but might only be a corporation gaol-keeper, and as ſuch have nothing to do with the proceſs of the Court (*a*), permitted him to juſtify.

(*a*) The rule of *Hil.* 6 *Geo.* 2. *ſ.* 7. *C. B.* after ſtating that great inconvenience had ariſen "by reaſon that ſheriff's officers, bailiffs, and other perſons concerned in the "execution of proceſs" become bail; orders, that "no ſheriff's officer, bailiff, or other "perſon concerned in the execution of proceſs ſhall be permitted or ſuffered to become bail in any action or ſuit depending "in this Court." Accordingly in *Bolland* v. *Pritchard,* 2 *Bl.* 799. a perſon merely employed to ſummon juries was rejected as being a ſheriff's officer within the *letter* of the firſt part of the rule; and in *Hawkins* v. *Magnall, Doug.* 466. the keeper of the *Poultry* compter was alſo rejected, on the ground as it ſhould ſeem of his being within the latter words of the rule, *viz.* "other perſons concerned in the execution "of proceſs."

May 17th.

Ames *v.* Hill.

A mere *cognovit* need not be ſtamped; but if it contain any terms of agreement it does require a ſtamp. An agreement to confeſs judgment for 30*l.* to ſecure 5 *l.* and coſts is not an agreement for payment of more than 20 *l.* within 23 *Geo* 3. *c.* 58 *ſ.* 4. and therefore need not be ſtamped.

The Defendant in this caſe having given a cognovit to the Plaintiff on unſtamped paper, whereby he agreed to confeſs that the Plaintiff had ſuſtained damage in the action to the amount of 30*l.* on which no judgment was to be entered unleſs the Defendant made default in payment of the ſum of 5 *l.* by inſtalments, together with coſts to be taxed; the Plaintiff for default of payment entered up judgment thereon.

To ſet aſide this judgment, *Shepherd* Serjt. on a former day obtained a rule *niſi*, on the ground of the cognovit not being on a ſtamp; contending that it was an agreement for the payment of a ſum above 20*l.* and therefore within the proviſions of the ſtamp act.

Againſt this rule *Marſhall* Serjt. ſhewed cauſe, and inſiſted that a cognovit need not be ſtamped; and that if this were deemed an agreement, it was an agreement to pay leſs than 20*l.* therefore not liable to the ſtamp duty (*a*), obſerving that the duty on bonds does not extend to the penalty but only the ſum ſecured (*b*).

The Court took time to conſider of the point, and on this day,

Lord ELDON Ch. J. ſaid: We are of opinion that a cognovit requires no ſtamp; and alſo that if a paper be a mere authority to enter a cognovit, ſuch mere authority requires no ſtamp: but that if there be any thing of agreement beyond the mere authority a ſtamp then becomes neceſſary. A cognovit is a mere acknowledgment of an account, and there is no mutuality; but if any terms be added, it then becomes ſuch an agreement as falls within the proviſions of the act. In this caſe we think the paper in queſtion amounted to an agreement; but that within the meaning of the act, it was an agreement for leſs than 20*l.*

Per Curiam. Rule Diſcharged.

(*a*) 23 Geo 3. c. 58. ſ. 4.

(*b*) ſ. 1.

PILKINGTON *v.* GREEN and Another.

May 18th.

A warrant was directed to an officer of exciſe by the commiſſioners, commanding him to apprehend a perſon convicted in ſeveral penalties and *take him to priſon and keep him there until the amount of the penalties was paid*; the officer having arreſted the party diſcharged him upon a promiſſory note for the amount of the penalties payable at a future day, and the commiſſioners afterwards approved of his conduct. Held that the diſcharge was a good conſideration for the note, and that an action might be maintained thereon.

THIS was an action by the Plaintiff, as indorſee, againſt the Defendants as makers of a promiſſory note for 50*l.* payable nine months after date.

The cauſe was tried before Lord *Eldon* Ch. J. at the *Weſtminſter* ſittings in this term, when a verdict was found for the Plaintiff with liberty to the Defendant to move to have a verdict entered in his favour. The caſe in ſubſtance was this. The Defendant *Green* having been convicted by the commiſſioners of exciſe in penalties to the amount of 150*l.* was taken into cuſtody on a warrant directed to the exciſe officer at *Oſweſtry*, "to take and arreſt the body of the ſaid *J. Green* if found, &c. and forthwith to carry the ſame to the gaol or priſon of and for the county

1800.

PILKINGTON v. GREEN and Another.

or place where you ſhall ſo take and arreſt the ſame, and the ſame together with a duplicate of this warrant, there to deliver into the cuſtody of the ſaid gaoler or keeper of the ſaid gaol or priſon until he ſhall ſatisfy and pay the ſaid ſum of 150*l.*" *Green* being unable to pay the money, the officer agreed to take three notes for 50 *l.* each at nine months, one of which was the note in queſtion; and thereupon diſcharged him out of cuſtody and gave him a receipt for the notes. The conduct of the officer upon this occaſion, was afterwards fully ſanctioned by the commiſſioners.

Beſt Serjt. on the part of the Defendants, now contended that there was no conſideration for the note, and that if there were any conſideration it was againſt law; and argued that the officer whoſe authority was merely miniſterial, could not diſcharge *Green* on his giving theſe notes payable at a future day, but was bound to execute the warrant according to its tenor, by taking him to gaol, and keeping him there until he paid the money; that the officer's diſcharge under theſe circumſtances was of no effect, and that *Green* was liable to be taken again; that this was like the caſe of a perſon taken in execution under a *ca. ſa.* where the ſheriff has no power to diſcharge his priſoner but muſt keep him *in ſalvâ cuſtodiâ*, *Love*'s caſe, *Salk.* 28.; and that if the diſcharge which was the conſideration of the note were void at the time when the note was given, the ſubſequent approbation of the commiſſioners would not make it good.

Cockell and *Shepherd* Serjts. *contrà*, were proceeding to ſhew cauſe in the firſt inſtance, but

The Court ſtrongly inclined to ſupport the verdict, and took till the next day to conſider; when,

Lord ELDON Ch. J. ſaid: We have looked into the caſe cited from *Salkeld*; and are of opinion that under the circumſtances of this caſe, the note, having been accepted by thoſe who were intereſted in it, has a ſufficient conſideration to ſupport it.

Per Curiam. Poſtea to the Plaintiff.

1800.

May 19th.

DE SYMONDS *v.* SHEDDEN.

ASSUMPSIT on a policy of inſurance, on a ſhip and goods at and from *London* to *Emden*, " beginning the adventure on the ſaid goods and merchandizes from the loading thereof on board the ſaid ſhip." At the end of the policy there was a memorandum " whereby the ſaid inſurance was declared to be on 15 hogſheads of tobacco, marked B. S. No. 51 and 65, valued at 550*l*."

The firſt count of the declaration after ſetting out the policy and averring the promiſe, ſtated, " that before the making of the ſaid writing or policy of inſurance divers to wit 15 hogſheads of tobacco the goods, wares, and merchandizes in the ſaid policy mentioned" of great value, to wit, of the value of 800*l*. were loaden and put on board the ſaid ſhip, and continued on board the ſaid ſhip from thence until and at the time of the loſs hereinafter next mentioned, and that the Plaintiff until and at the time of the loſs and damage hereinafter mentioned, was intereſted in the ſaid premiſes in the ſaid writing or policy of aſſurance mentioned to a large value, to wit, to the value of all the monies ſo inſured by them thereon, and that the ſaid inſurance ſo made by him was ſo made for and on his account and for his own uſe and benefit, to wit, at *London* aforeſaid in the pariſh and ward aforeſaid. And the ſaid Plaintiff further ſaith, that afterwards, to wit, on, &c. the ſaid ſhip with the ſaid goods and merchandizes ſo loaden on board her as aforeſaid, departed and ſet ſail on her ſaid intended voyage towards *Embden* aforeſaid, and that afterwards and during her ſaid voyage, to wit, on, &c. after her departure from *London* aforeſaid and before her arrival at *Embden* aforeſaid, on the high ſeas, by and through the mere dangers of the ſeas, &c. was greatly damaged, &c. and the ſaid goods and merchandizes thereby then and there in the ſaid voyage were wetted, damaged, and wholly ſpoiled, and rendered of no uſe or value to him the ſaid Plaintiff.

To this there was a ſpecial demurrer, aſſigning the following cauſes; " For that it is not alleged nor does it appear in or by the ſaid firſt count of the ſaid declaration that any goods or merchandize were loaden on board of the ſaid ſhip in that count mentioned, at *London* in the ſaid writing or policy of inſurance men-

Declaration on a policy on ſhip and goods at and from *London* to *Embden*, " beginning the ſaid adventure on the ſaid goods, &c. from the loading thereof on board the ſaid ſhip;" in the policy there was a memorandum whereby the ſaid inſurance was declared to be on 15 hogſheads of tobacco marked " B. S. No. 51 and 65." Special demurrer, 1ſt, becauſe the goods were not averred to have been put on board at *London*: 2dly, becauſe the goods were not alleged to have been marked or numbered as in the memorandum, but only thus: " 15 hogſheads the goods, &c. in the ſaid policy mentioned;" 3dly, becauſe the Plaintiff was ſtated to have been intereſted until and at the time of the loſs, without ſhewing that he was intereſted at the time of the policy being made; 4thly, becauſe no venue was laid to the allegation of loſs on the high ſeas. *Semb.* that the declaration was bad.

1800.

De Symonds v. Shedden.

tioned, or that the ſaid goods and merchandize which are in that count alleged to have been on board of the ſaid ſhip at the time of the loſs in that count mentioned were loaden on board of the ſaid ſhip at *London* aforeſaid or at what time or at what place the ſaid goods and merchandize were loaden on board the ſaid ſhip, whereas the beginning of the adventure of the Defendant upon the goods and merchandize mentioned in the ſaid writing or policy of aſſurance in the ſaid firſt count of the ſaid declaration mentioned is by the ſaid writing or policy of inſurance declared to be from the loading thereof on board the ſaid ſhip, and the ſaid Defendant is not according to the meaning and effect of the ſaid writing or policy of inſurance in the ſaid firſt count mentioned liable for loſſes ſuſtained by or upon any goods or merchandize which were not loaden on board the ſaid ſhip at *London* aforeſaid, and alſo for that it is not alleged nor does it appear in or by the ſaid firſt count of the ſaid declaration that the ſaid hogſheads of tobacco therein alleged to have been loaden on board the ſaid ſhip were marked or numbered in the manner in the ſaid writing or policy of inſurance mentioned whereas the ſaid Defendant is not according to the meaning and effect of the ſaid writing or policy of inſurance liable for loſſes ſuſtained by or upon any goods except 15 hogſheads of tobacco marked and numbered in the manner in the ſaid writing or policy of inſurance in that behalf mentioned. And alſo for that it is not alleged nor does it appear in or by the ſaid firſt count of the ſaid declaration that the ſaid Plaintiff or that any or what other perſon had at the beginning of the ſaid adventure any intereſt or concern in the ſaid goods therein alleged to have been loaden on board of the ſaid ſhip, or at what time the ſaid Plaintiff began to have any intereſt or concern therein; and alſo for that it is not alleged nor does it appear in or by the ſaid firſt count of the ſaid declaration where or at what place the ſaid goods therein mentioned were wholly ſpoiled and rendered of no uſe or value to the ſaid Plaintiff, but the ſaid goods are therein and thereby alleged to have been wholly ſpoiled and to have been rendered of no uſe or value without any place or venue being in that behalf mentioned; and alſo for that the ſaid firſt count of the ſaid declaration is in various other reſpects inſufficient, informal, and defective."

Joinder in demurrer.

Heywood Serjt. in ſupport of the demurrer. 1ſt, It ſhould have been averred that the goods were put on board the ſhip at *London*:

for if they were put on board at any other place, the policy has not been complied with. *Hodgſon* v. *Richardſon*, 1 *Bl.* 463. That was the caſe of an inſurance at and from *Genoa*, the cargo having been taken in at *Leghorn*, and the ſhip having lain above five months at *Genoa* waiting for convoy, which circumſtance, though known to the inſured, was not communicated to the underwriter. The words of Mr. Juſtice *Wilmot* are very ſtrong: "The fact diſcloſed by this policy is not true, that *Genoa* is the loading port, for ſo it muſt be underſtood; and in ſuch caſes I will not ſpeculate on the materiality or immateriality of the fact." The policy in this caſe being at and from *London*, the ſubſequent words, "beginning the adventure on the ſaid goods and merchandize from the loading thereof on board the ſaid ſhip," are neceſſarily confined to a loading at *London*. It is impoſſible to argue that the words "to wit at *London* aforeſaid in the pariſh and ward aforeſaid" can be ſo applied to the averment of loading as to deſcribe the place where that loading was made; ſince they do not occur until after the intervention of ſeveral independent and diſtinct averments. Nor will the Court read the declaration with an endeavour to ſupport it, for the rule has been eſtabliſhed ever ſince the time of *Plowden* that the intendment is againſt the party averring. 2dly, It was neceſſary to ſhew that the goods were marked and numbered in the manner ſtated in the policy, ſince the undertaking of the underwriters does not extend to any goods not ſo marked and numbered. 3dly, It ought to appear that the aſſured was intereſted in the goods not only at the time of the loſs, but alſo at the time of making the inſurance: for otherwiſe the policy is void. *Sadlers'* Company v. *Badcock*, 1 *Wilſ.* 10. *Hibbert* v. *Carter*, 1 *T. R.* 745. *Perchard* v. *Whitmore*, *Guildhall* ſittings, after *Michaelmas* term 1786, before *Buller* J. (a) 4thly, There

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(a) *Perchard* v. *Whitmore*, *Guildhall* ſittings, after *Mich. Term* 1786.

Action on a policy of inſurance on board the ſhip *L'Aurore* at and from *Cette* to *Guernſey*. In the declaration it was averred that *Peter Maingy* and *Nicholas Maingy*, until and at the time of the loſs were intereſted in the goods and merchandizes in the ſaid policy mentioned to a great value, to wit, &c. and that the ſaid inſurance was ſo made for the ſaid *P. M.* and *N. M.* and for their account. In the courſe of the cauſe the Plaintiff called Mr. *Le Meſurier*, who was objected to as an intereſted witneſs. He admitted that having no intereſt in the goods inſured when the policy was effected, he had ſince become a partner with *P. M.* and *N. M.* and had taken a ſhare of all the ſtock, and among other things of the goods inſured. Upon this Mr. *Le Meſurier* was rejected. But *Cowper* for the Defendant preſſed that the Plaintiff might be nonſuited, inſiſting, that as Mr. *Le Meſurier* was intereſted in the goods inſured, the averment in the declaration was not proved.

Buller J. ſaid, he thought the Plaintiff ought not to be nonſuited upon that point, for that Mr. *Le Meſurier* was not intereſted at the

There are two material facts in this declaration; one the promiſe to pay in caſe of a loſs, and the other that a loſs took place. To the latter of theſe no venue is aſſigned. And though it be true that the allegation of the promiſe having been made in an *Engliſh* county, will draw to it the cognizance of the other fact which took place out of *England*, provided a venue in *England* be alleged, yet it is neceſſary to allege a venue, as in the caſe of a bond made abroad.

Bayley Serjt. *contrà*. 1ſt, It ſufficiently appears that the goods were put on board at *London*. The ſeveral allegations of the loading the goods, the value of the goods, the intereſt of the plaintiff, and that the inſurance was made on his account, are all parts of one ſentence; and the words, "to wit, at *London* aforeſaid in the pariſh and ward aforeſaid," with which that ſentence concludes, apply to the whole, and may be conſidered as inſerted at the end of every branch. The averment is not the leſs certain becauſe it comes under a "to wit," and if the "to wit" be omitted, the loading, which is the firſt member of the ſentence, is alleged to have taken place at *London*. Beſides, it is not material that it ſhould appear upon record that the goods were put on board at the place mentioned in the policy. The meaning of the expreſſion in the policy is, that the riſk ſhall begin from the time of the goods being laden on board the ſhip at the place mentioned in the policy; but whether the goods be firſt laden on board the ſhip before or after her arrival at that place the policy will be equally complied with. It may be material, indeed, in many caſes to repreſent to the underwriters at what place they were actually put on board. And the caſe of *Hodgſon* v. *Richardſon* was decided entirely on the want of a proper repreſentation. 2dly, It is ſufficient to obſerve, that the declaration avers that 15 hogſheads of tobacco, "the goods mentioned in the policy," were put on board. 3dly, It is not neceſſary that the party inſuring ſhould have an intereſt at the time of the policy being effected, for perhaps he may inſure on the knowledge of goods about to be conſigned to him, and a reaſonable expectation has always been held the ſubject of an inſurance. If it were otherwiſe, policies on "goods ſhipped or to be ſhipped" could not be ſupported.

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the time of making the policy to which the averment of intereſt related, and the Plaintiff brought the action for thoſe who were intereſted at the time.

Many other points were conteſted in the cauſe, and a verdict was found for the Defendant.

4thly, It appears that the loſs was on the high ſeas, and it is a general rule that the venue where the cauſe is laid draws to it the trial of all facts ariſing abroad. In 6 *Co.* 47. *b.* a caſe upon a policy of inſurance is mentioned which is preciſely in point. To the ſame effect are *Lutw.* 699. *Ilderton* v. *Ilderton*, 2 *H. Bl.* 161. and *Neale* v. *De Garay*, 7 *T. R.* 243.

The Court inclined to think the declaration bad, but took time to conſider of their opinion.

And on a ſubſequent day gave leave to the Plaintiff to amend without coſts.

Stanway *qui tam* v. Perry, Sheriff of Eſſex.

May 24th.

In a penal action a *capias ad reſpondendum* iſſued within a year after the offence committed, but never was ſerved on the Defendant or returned; after the expiration of the year, but in the ſame term, a *capias per continuance* iſſued and was duly ſerved and returned; the declaration was of the term in which both writs iſſued. Held that the firſt writ not having been returned could not be connected with the ſecond ſo as to ſupport the action.

This action was brought to recover the penalty impoſed by the 29 *Eliz. c.* 4. on ſheriffs for extortion.

At the trial before Lord *Eldon* Ch. J. at the ſittings after *Hilary* term, the Plaintiff, in order to ſhew that the action was commenced within a year, gave in evidence two writs, the one a *capias ad reſpondendum* iſſued on the 8th of *November* 1799, and the other a *capias per continuance* iſſued on the 13th of the ſame month; the former of theſe writs iſſued within a year after the offence committed, but the latter did not: the Defendant was ſerved with the latter writ only. The declaration was of *Michaelmas* term. A verdict was found for the Plaintiff. After the verdict was given, it was diſcovered and objected by the Defendant's counſel, that the firſt writ had never been returned, and could not therefore be connected with the ſecond. On an affidavit of this fact a rule was obtained calling on the Plaintiff to ſhew cauſe why the verdict ſhould not be ſet aſide and a nonſuit be entered.

Shepherd Serjt. now ſhewed cauſe, and contended, that as the declaration in this caſe was of the ſame term with that in which the firſt writ iſſued, namely, *Michaelmas* term 1799, it was not neceſſary that it ſhould have been returned in order to ſupport the action; for although in *Harris* v. *Woolford*, 6 *T. R.* 617. it was held neceſſary that the firſt of two writs iſſued in that caſe ſhould appear to have been returned in order to ſave the ſtatute of limitations, yet it was to be obſerved that there the declaration was not delivered within a year after the firſt writ iſſued; whereas in *Parſons* v. *King*, 7 *T. R.* 6. the Court held, that if the Plaintiff declare any time within a year after a writ iſſued in time to ſave his action, it need not be ſhewn that ſuch writ was returned. He ſaid that this caſe, therefore, might be conſidered as if the ſecond writ had never iſſued at all.

Bayley Serjt. *contrà*, relied on *Harris* v. *Woolford;* and obſerved, that in *Parſons* v. *King*, as one writ only had iſſued and the Plaintiff had declared within a year, it muſt be underſtood that he had declared on that writ; whereas in the preſent caſe, as the Defendant had been ſerved with the ſecond writ only, it was evident that he could only have appeared to the ſecond writ, and that the Plaintiff muſt be taken to have declared upon that writ only. He added, that this very point had been decided in this Court in a caſe of *Field qui tam* v. *Carrol*, *M.* 32 *Geo.* 3. before *Eyre* Ch. J. who nonſuited the Plaintiff on a ſimilar objection.

The Court agreed that the diſtinction between the caſes cited proceeded on the circumſtance of two writs having iſſued in the former and one only in the latter; and held, that if two writs be iſſued, one within a year after the offence committed and the other not, it is neceſſary that the firſt writ ſhould be returned in order to connect it with the ſecond, and thereby make the action appear to have been commenced in due time.

The objection, however, not having been taken till after the verdict had been given, the Court refuſed to enter a nonſuit, but made the rule abſolute for a new trial.

Price *v.* Messenger and Another.

May 24th.

If an officer ſeize goods in obedience to the warrant of a magiſtrate, whether that warrant be legal or not, he cannot be ſued without a previous demand of a copy and peruſal of the warrant according to 24 *Geo.* 2. *c.* 44. If the warrant be to ſeize "ſtolen goods," and the officer ſeize goods which turn out not to have been ſtolen, he is ſtill within the protection of 24 *Geo.* 2. *c.* 44.

Treſpaſs for ſeizing and taking a quantity of moiſt ſugar, and a quantity of tea, and nails of the Plaintiff, and for aſſaulting and impriſoning his perſon, and for carrying the Plaintiff, together with the above goods, before a juſtice of the peace, under colour and pretext that part of the ſaid goods, to wit, the ſugar had been before then feloniouſly ſtolen from ſome ſhip in the *Thames*, and had been found concealed in certain premiſes of the Plaintiff in which he carried on his trade and buſineſs of a grocer. There was a ſecond count for aſſaulting and impriſoning the Plaintiff generally, and a third for ſeizing and taking away his goods.

The Defendants pleaded not guilty as to all but taking away the tea and nails, as to which they ſuffered judgment by default.

This cauſe came on before Lord *Eldon* Ch. J. as well to try the iſſue joined, as to aſſeſs damages upon the judgment by default at the *Weſtminſter* ſittings after laſt *Hilary* term. The evidence was in ſubſtance as follows: The Plaintiff was a grocer living on the *Surry* ſide of *Weſtminſter* bridge, and the Defendants two conſtables of one of the police offices in *Weſtminſter*. On the 2d of *April* 1799 an information was exhibited againſt the Plaintiff at the police-office, upon which the following warrant was granted. "*Surry* and *Middleſex* to wit. To all conſtables and other his Majeſty's officers of the peace whom theſe may concern. Whereas complaint upon oath hath been this day made unto me one of his Majeſty's juſtices of the peace for the ſaid counties by *Henry Naſh* that there was lately ſtolen from ſome ſhip or veſſel lying in the River *Thames* a quantity of ſugar and that there is juſt cauſe to ſuſpect that the ſaid ſtolen goods are knowingly *concealed or depoſited* in the ſhop warehouſes outhouſes yard or premiſes belonging to and occupied by *Price* and Co. ſituate the ſecond houſe in *Coads Row* on the *Surry* ſide of *Weſtminſter* bridge nearly oppoſite to *Aſtley*'s theatre, theſe are therefore to require you forthwith to make diligent ſearch in the day time in the ſaid premiſes for the ſaid ſtolen goods, and if you find the ſame or any part thereof that then you ſecure the ſaid goods, and bring the perſon or perſons in whoſe cuſtody you find the ſame before me or ſome other of his Majeſty's juſtices of the peace to be examined and dealt with according to law. Given under my hand and ſeal the 2d day of *April* 1799, *P. Colquhoun*." On the ſame day on which the warrant iſſued the Defendants went to the Plaintiff's houſe, and finding ſome ſugar of a particular quality ſelling under prime coſt, and a bag of nails and two parcels of tea of which no ſatisfactory account was given, ſent to the office requeſting inſtructions for their conduct reſpecting the tea and nails which were not mentioned in the warrant; upon which they were ordered by the magiſtrate to bring the ſugar, tea, and nails to the office. This they accordingly did, and at the ſame time carried the Plaintiff before the magiſtrate, who diſcharged him for that day, but deſired him to attend the next morning. The Plaintiff having attended the next morning, and no ſufficient evidence having been produced againſt him, he was diſcharged altogether, and his property was afterwards reſtored. It was proved that the Defendants had conducted themſelves with great civility towards the Plaintiff. Lord *Eldon* directed the jury that the warrant was no juſtification as to any thing but the aſſault, impriſonment, and taking the ſugar, and that the verbal orders of the magiſtrate under which the Defendants ſeized the tea and nails would not avail them. For the Plaintiff, however, it was inſiſted that even the aſſault, impriſonment, and taking the ſugar under the circumſtances of the caſe, were not juſtified by the warrant: on the other hand, it was contended that they were juſtified by the warrant which was granted by virtue of the bum-boat act (*a*); and that at all events a copy of the warrant ſhould have been demanded, purſuant to 24 *Geo.* 2. *c.* 44. His Lordſhip having deſired the jury to diſtinguiſh the damages incurred by the ſeizure of the tea and nails, from thoſe incurred by the aſſault impriſonment and ſeizure of the ſugar, a verdict was found of 30*l.* for the former, and 70*l.* for the latter.

A rule having been moved for, calling on the Plaintiff to ſhew cauſe why this verdict ſhould not be ſet aſide, it was granted as to the 70*l.* the Court intimating an opinion that as to the 30*l.* the verdict could not be diſturbed.

Shepherd and *Beſt* Serjts. now ſhewed cauſe. The main objection to the Plaintiff's recovery is, that no demand was made of a copy of the warrant under which the Defendants acted, purſuant to 24 *Geo.* 2. *c.* 44. But no officer can avail himſelf of that objection, unleſs he ſhew that he has acted in *obedience* to the warrant of a magiſtrate, *per* Lord *Mansfield*, *Dawſon* or *Lawſon* v. *Clarke*, cited 3 *Bur.* 1767; whereas in this caſe the Defendants exceeded the authority delegated to them by the magiſtrate. Where the warrant itſelf authoriſes others to act in a matter not within the juriſdiction of the magiſtrate, he is perſonally reſponſible; but where an officer exceeds his authority, the magiſtrate who gave that authority is not liable for ſuch exceſs. Here the warrant was to ſeize ſtolen ſugar, and the officers were bound at their peril to ſeize ſtolen ſugar or none at all. In the caſe of *Boote* v. *Cooper*, cited 1 *T. R.* 535. where the warrant was to enter and *ſearch* for concealed goods, it was rightly held that the officer was juſtified in entering and ſearching, though no con-

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(*a*) 2 *Geo.* 3. *c.* 28. *ſ.* 7. which enacts, that it ſhall be lawful for any juſtice of the peace, upon information on oath, that there is cauſe to ſuſpect that any merchandizes *&c.* (ſuſpected to have been ſtolen or unlawfully come by, or taken from ſome ſhip or veſſel in the river *Thames*) are concealed in any dwelling-houſe, warehouſe, *&c.* by warrant under his hand and ſeal, to cauſe every ſuch dwelling-houſe, *&c.* to be ſearched in the day time; and if any ſuch merchandizes *&c.* ſhall be found therein, to cauſe the ſame to be depoſited in ſome place of ſafety, and alſo to cauſe the perſon in whoſe houſe *&c.* the ſame ſhall be found, to be brought before him; and if ſuch perſon ſhall not give a ſatisfactory account how he came by the ſame, he ſhall be adjudged guilty of a miſdemeanor.

cealed goods were found, that being no exceſs of authority; but in *Entick* v. *Carrington*, 2 *Wilſ.* 286. *De Grey* Ch. J. ſeems to have conſidered that an officer who, under a warrant to ſearch for ſtolen goods, ſhould ſeize the goods of the owner of the houſe, would not be within the protection of the 24 *Geo.* 2. *c.* 44. Suppoſing the warrant itſelf to be legal, ſtill the Defendants have not executed it according to its true ſpirit; for they were not to decide wantonly that any ſugar found in the Plaintiff's houſe was ſtolen ſugar, but to exerciſe a ſound diſcretion. Now the ſugar ſeized by the Defendants appears to have been expoſed in a ſituation in which no man would place goods ſubject to ſeizure. Though the warrant ſpeaks of ſugar depoſited or concealed, yet the word "depoſited" when applied to ſtolen goods, muſt mean depoſited for the purpoſe of concealment; eſpecially as it is connected with the word "conceaed."

Cockell and *Bayley* Serjts. *contrà.* If the officers acted in obedience to the warrant, it is altogether immaterial whether the warrant were legal or illegal; for if legal the officers and the magiſtrate are both juſtified; if illegal the magiſtrate alone is reſponſible. It would be highly dangerous to allow the officer to exerciſe his judgment whether the warrant directed to him by the magiſtrate were good or not; it is his duty to obey. The warrant in this caſe only aſſerted that there was ſtolen ſugar in the Plaintiff's houſe, and ordered the officers to ſeize it; now it was impoſſible for them to aſcertain whether the ſugar they found was ſtolen or not, or how much of it was in that predicament.

Lord Eldon Ch. J. The ground upon which I have formed my opinion in this caſe may be ſtated in a very few words. The public intereſt requires that officers who really act in obedience to the warrant of a magiſtrate ſhould be protected. In ſuch caſes, therefore, the law has provided that the remedy of the party grieved ſhall be confined to the magiſtrate, as well where he has granted a warrant without having juriſdiction, as where the warrant which he has granted is improper. The ſtatute provides that no action ſhall be brought againſt an officer for any thing done in obedience to any warrant of any juſtice of the peace, unleſs a demand hath been made of a copy and peruſal of the warrant; and that in caſe, after compliance with ſuch demand, any action ſhall be brought againſt ſuch officer for any ſuch cauſe as aforeſaid, without making the juſtice a Defendant, a verdict ſhall be given for the Defendant, "notwithſtanding any defect of juriſdiction in ſuch juſtice;" and if ſuch action be brought jointly againſt ſuch juſtice and alſo againſt ſuch officer, on proof of ſuch warrant,

1800.

Price *v.* Messenger and Others.

warrant, the jury ſhall find for the officer "notwithſtanding any ſuch defect of juriſdiction as aforeſaid." The act therefore takes it for granted, that an officer may be ſaid to act in obedience to the warrant of a juſtice of the peace, though ſuch juſtice had no juriſdiction, and though the warrant be an abſolute nullity. For it is as much a defect of juriſdiction, if the juſtice grant an improper warrant in a caſe over which he has juriſdiction, as if he had no juriſdiction over the caſe at all. The only queſtion therefore is, Whether the act of the officer were done in obedience to any warrant of any juſtice of the peace? And conſidering the nature of the protection intended to be given to officers by this act, I think it reaſonable to ſay that the Defendants in this caſe acted in obedience to the warrant within the meaning of the legiſlature. If this be ſo, it is ſufficient for the Defendant to ſay that no demand of a peruſal and copy of the warrant was made, whether that warrant on production would have afforded a defence or not. It was not agreed by the Plaintiff's counſel whether the warrant itſelf were legal or illegal. Now ſuppoſe it to have been legal: the officer acted with as much preciſion in the execution of the warrant, as the juſtice in granting it. If the information given to the latter was inſufficient to enable him to deſcribe the goods with certainty, the former was unable to aſcertain with certainty what goods he was directed to ſeize. Then ſuppoſe the warrant to have been illegal, it was not competent to the Defendant to judge of its legality. If he executed it in the only way in which it was capable of being executed, namely, by making it attach on all goods which fell within the deſcription contained in it, he acted in obedience to it: and having done ſo, he is entitled to avail himſelf of the protection of the act. Whether the warrant would have afforded a defence to the juſtice or not I ſhall give no opinion.

Heath J. The only queſtion is, Whether the conſtable acted in obedience to the warrant? Whether the warrant were legal or not, we are not called upon to decide. When this Defendant ſeized the teas he was not acting in obedience to the warrant; but when he ſeized the ſugars he was. The warrant, after ſtating that certain ſugars had been ſtolen, and that there was reaſon to ſuſpect that the ſame were concealed or depoſited in the Plaintiff's houſe, directs the Defendant to ſeize them. Under theſe circumſtances, he could not act otherwiſe than he has done.

Rooke J. The Defendant appears to me to have acted in obedience to his warrant, and therefore to come within the protection of the ſtatute. If the warrant were illegal the Plaintiff might have proceeded againſt the juſtice: but as he has choſen to abandon that remedy and to proceed againſt the conſtable, he is only entitled to a verdict for ſuch damages as aroſe from that ſeizure which was not made in obedience to the warrant.

Verdict to be entered for the Plaintiff for 30*l.* only.

DICKER *v.* ADAMS, Executor.

May 26th.

If iſſue be joined upon one of three pleas, and judgment be entered by default upon the two others, the Plaintiff cannot execute a writ of inquiry on thoſe pleas on which he has judgment, but muſt award jury proceſs, *tam ad triandum quam ad inquirendum.*

INDEBITATUS aſſumpſit. The Defendant pleaded firſt *non aſſumpſit*; ſecondly, *non aſſumpſit infra ſex annos;* and thirdly, a ſet-off. On the firſt plea iſſue was joined; and to the two laſt there was a demurrer. No joinder in demurrer having been put in, the Plaintiff ſigned judgment. After this a writ of inquiry of damages on the two counts upon which judgment had gone by default was executed.

A rule *niſi* was obtained upon a former day to ſet aſide this writ of inquiry, and all proceedings thereon, for irregularity; becauſe, as iſſue was joined on *non aſſumpſit*, the Plaintiff ſhould have entered the iſſue and awarded jury proceſs as well to try the iſſue joined as to inquire of the damages on the interlocutory judgment.

Shepherd Serjt. now ſhewed cauſe againſt the rule, and *Lens* Serjt. in ſupport of it, cited *Tidd's Pract. K. B.* 795. *ed.* 2. (*a*)

The Court were clearly of opinion that as an iſſue was joined upon the record, the Plaintiff ought not to have executed a writ of inquiry on the two pleas on which judgment had gone by default.

Rule abſolute.

(*a*) P. 591. ed. 1.

PARIENTE, Aſſignee, &c. *v.* CASTLE, One, &c.

May 26th.

The Court will not diſcharge a priſoner out of execution, becauſe there is no judgment againſt him docketed and entered upon the rolls of the Court.

THIS was an application to diſcharge the Defendant out of the cuſtody of the warden of the *Fleet* as to the execution in this caſe, becauſe there was no judgment docketed and entered on the rolls of the Court whereon to found the writ of execution.

Bayley Serjt. in ſupport of the rule.

Shepherd Serjt. *contrà.*

The Court rejected the application, ſaying it was unprecedented.

Rule diſcharged.

1800.

May 26th.

ANDERSON *v.* PITCHER & *Ux.*

A warranty to depart with convoy is not complied with, unleſs ſailing inſtructions be obtained before the ſhip leaves the place of rendezvous, if by due diligence of the maſter they can be then obtained.

THIS was an action for money had and received to the uſe of the Plaintiff by the Defendant's wife, before her intermarriage with the Defendant.

This cauſe was tried before Lord *Eldon* C. J. and a ſpecial jury at the *Guildhall* ſittings after *Hilary* term, when the following caſe appeared in evidence:—On the 31ſt of *October*, 1795, the Plaintiff underwrote a policy of inſurance on the *Golden Grove*, at five guineas *per cent.*, "at and from *London* to all or any of the *Weſt India* iſlands, *Jamaica* and *St. Domingo* excepted, with leave to go to the place of rendezvous to join convoy, and warranted to ſail from thence with convoy for the voyage." The ſhip having been loſt ſoon after ſhe ſailed from *Portſmouth*, the Plaintiff paid 284*l.* 5*s.* under the policy. To recover back that ſum the preſent action was brought, the Plaintiff being of opinion that the *Golden Grove* never received her ſailing inſtructions, and therefore had not fulfilled the warranty to depart with convoy. It now appeared that the *Golden Grove* arrived at *Spithead* about nine o'clock in the morning of the 15th *November* 1795; that ſhe came round under the care of the firſt mate, the captain himſelf being on ſhore at *Portſmouth*; that on the day preceding (the 14th) ſailing inſtructions were delivered at *Portſmouth* to all ſuch ſhips as applied regularly for them, and that the captain of the *Golden Grove* previous to her arrival made enquiry concerning ſailing inſtructions, but found that they could not be obtained until the ſhip was actually in ſight; that on the 15th of *November*, by day-light, Admiral Sir *H. C. Chriſtian*, the commander of the convoy, got under weigh, but had not entirely quitted the roadſtead until about four o'clock in the evening; that when he got under ſail he left the *Trident* frigate to bring up ſuch veſſels as did not weigh anchor with him; that about one o'clock of the ſame day the captain of the *Golden Grove* repaired on board, and got under weigh, at which time the *Trident* had alſo got under weigh, and both the admiral's ſhip and the *Trident* had then proceeded ſo far, that it was clear the *Golden Grove* could not overtake the former ſoon enough for the captain to go on board that night, and it was even doubtful whether he could overtake the latter; that on the next day, between 10 and 12 o'clock in the forenoon, the captain of the *Golden Grove*, being then only a quarter of a mile from the admiral's ſhip, went on board her, and obtained ſailing inſtructions; that ſoon afterwards the *Golden Grove* was loſt, having been, from the time of her departure to that of the loſs, under the protection of the convoy. Lord *Eldon* directed the jury, that although under ſome circumſtances ſailing inſtructions might be diſpenſed with, yet that this did not appear to be a caſe of that kind; that the *Golden Grove* did not appear to him to have departed from the place of rendezvous with convoy, ſince ſhe had either not arrived time enough to obtain ſailing inſtructions, or if ſhe had arrived time enough, her captain had not uſed the neceſſary endeavours to obtain them before he ſailed. The jury found a verdict for the Plaintiff.

Early in this term a rule *niſi* for a new trial was obtained, in ſupport of which affidavits of the Defendant's attorney, and of ſeveral naval men, to the following effect, were filed:—That the point upon which the verdict had proceeded was a matter of ſurprize upon the Defendant, it having been underſtood that the cauſe would be tried on the ſingle queſtion, Whether ſailing inſtructions had *ever* been obtained? that it is the conſtant practice for commanders of convoys to give ſailing inſtructions to veſſels which ſail under their protection, after leaving the place of rendezvous, and that ſuch veſſels are always underſtood to depart with convoy; that ſailing inſtructions are never given to the captain of any veſſel until the veſſel is in ſight; that when the Admiralty directs the commander of a ſhip of war at *Spithead* to take under convoy a fleet bound to the weſtward, he is generally inſtructed to put to ſea thirty hours after the wind has been fair, with a view to give time to the ſhips in the *Downs* to come round to *Spithead*; and, that as ſuch ſhips frequently do not arrive until the convoy is under weigh, and are often prevented, by blowing weather, from getting their ſailing inſtructions at the place of rendezvous, it is uſual for their captains to obtain them the firſt time the convoy is brought to at ſea.

Shepherd Serjt. in the courſe of the term ſhewed cauſe; and after obſerving, that as the facts of this caſe had been before the Court upon a former occaſion in *Webb* v. *Thompſon* (*a*), they would not interfere, unleſs they entertained very great doubts upon the queſtion; contended, that the *Golden Grove* was not within any of the exceptions to the general rule, which required ſailing inſtructions

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(*a*) *Ante*, vol. i. p. 5.

tions in order to the fulfiliment of a warranty to depart with convoy; and that conſequently, as ſhe had not obtained them before her departure from the place of rendezvous, ſhe had not fulfilled the warranty in this policy; that in this caſe the commander of the convoy was ready to have given ſailing inſtructions, had they been applied for; and that, if ſuch a latitude as was contended for was to be allowed, it muſt hereafter be deemed ſufficient if ſhips obtain their ſailing inſtructions the day before their arrival at the port of diſcharge.

Beſt Serjt. in ſupport of the rule. Although the *Golden Grove* had not obtained ſailing inſtructions on the 15th, when ſhe departed from *Spithead*, yet ſhe received them early enough on the next morning to conſtitute a departure with convoy within the ſpirit of the warranty. The words of the warranty do not require that ſailing inſtructions ſhould be obtained, and therefore a greater latitude may be allowed than in a conſtruction of the very letter of the warranty. Uſage of trade has been conſtantly admitted in the conſtruction of warranties to depart with convoy; thus, if a ſhip depart from the port of *London* and join convoy at *Portſmouth* or the *Downs*, it is a ſufficient compliance with the warranty to depart with convoy (*a*). Uſage therefore may be admitted in the preſent caſe, to ſhew that ſailing inſtructions are not neceſſary till the ſhip has actually put to ſea. No caſe has been cited to ſhew that they are neceſſary at the time of breaking ground; if they be obtained as ſoon as they become neceſſary for the protection of the ſhip, it is ſufficient; and, as the commander of the convoy in this caſe gave ſailing inſtructions to other ſhips at the ſame time that he gave them to the *Golden Grove*, it appears that he conſidered it ſufficient for their protection to deliver them at that time. It may be contended that the caſe of *Victoria* v. *Cleeve*, 2 *Str*. 1250. *Park's Inſur*. 348. is diſtinguiſhable from this; for there it was impoſſible to get ſailing inſtructions. But *Veedon* v. *Wilmot*, *Park's Inſur*. 341. *note a*. is in point, for there ſailing inſtructions were not applied for till after the convoy was under ſail. No neglect is imputable to the captain in this caſe; he applied for his ſailing inſtructions before the *Golden Grove* arrived, but was refuſed them; ſhe actually did arrive on the morning of the 15th, before the convoy had left the place of rendezvous; but, as the convoy was then under ſail, it may have been dangerous for him to put out a boat. On

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(*a*) *Vide ante*, p. 115.

1800.

ANDERSON *v.* PITCHER & UX.

the morning of the 16th the ſailing inſtructions were obtained without any inconvenience having ariſen from the waut of them, the ſhip having remained the whole time under the protection of the guns of the convoy.

Cur. adv. vult.

The opinion of the Court was now delivered by

Lord **ELDON**, Ch. J. This action is brought to recover back 284*l.* 5*s.*, paid by the Plaintiff as under-writer of a policy on the ſhip *Golden Grove*, to the Defendant, the aſſured in that policy, under the ſuppoſition that the loſs which happened was within the terms of his undertaking. He now ſays, that on a better examination of all the circumſtances attending that loſs, he finds he was not liable, as he had erroneouſly ſuppoſed, and therefore, that the money which he paid to the Defendant under a miſtake may be recovered back by him. This is a caſe in which the convoy appointed by government was ready to give ſailing inſtructions at the place of rendezvous, to all ſuch veſſels as were ready to receive them. And it appears to me, that if the captain of the *Golden Grove* had been on board his ſhip at nine o'clock in the morning, when ſhe arrived, he might have obtained ſailing inſtructions from the frigate before he left the place of rendezvous. In point of fact, however, the admiral was under weigh before the *Golden Grove* arrived, and the frigate was under weigh before the captain was on board. It is clear alſo, that the captain of the *Golden Grove* could not have gone on board the admiral that night, and it was very doubtful whether he could have gone on board the frigate. The queſtion for the Court to decide is, Whether a new trial ſhould be granted, the jury having determined that, under all the circumſtances of the caſe, the warranty was not complied with? Conſidering that the caſe came to trial chiefly on the queſtion, Whether or not any ſailing inſtructions were ever obtained by the *Golden Grove?* and that the Defendant was ſomewhat ſurpriſed by the point raiſed at the trial, reſpecting the time at which the ſailing inſtructions were obtained, I ſhould wiſh a new trial to be granted, if I could ſee any propoſition of law to be ſtated to a jury in the Defendant's favour. But it ſeems to me, as well from the affidavits as the evidence, that the Defendant would not be entitled to retain a verdict if he ſhould obtain one. The policy contained this warranty: That the ſhip ſhould be at liberty to go to the place of rendezvous to join convoy, and that ſhe ſhould ſail from thence with convoy for the voyage. It is now too late to ſay that this warranty is not to be expounded with due regard to the uſage of trade. Perhaps it is to be lamented, that in policies of inſurance, parties ſhould not be left to expreſs their own meaning by the terms of the inſtrument. This ſeems to have been the opinion of that great judge Lord *Holt* (*a*). It is true, indeed, that Lord *Mansfield*, who may be conſidered the eſtabliſher, if not the author, of a great part of this law, expreſſed himſelf thus: "Wherever you render additional words neceſſary and multiply them, you alſo multiply doubts and criticiſms (*b*)." Whether, however, it be not true, that as much ſubtlety is raiſed by the application of uſage to the conſtruction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reaſonably queſtioned. If, therefore, the queſtion before us be ſtill undetermined, the inclination of my mind will be to adhere to the letter of the contract; and I feel the more diſpoſed to do ſo, ſince it appears moſt clearly, from the affidavits which have been produced, that no man of the higheſt experience in the navy can aſcertain, by any reference to uſage, what other interpretation ought to be adopted. The firſt queſtion is, What is the meaning of the words, "departing with convoy"? Do they mean departing with ſailing inſtructions in all caſes? or, Do they mean departing with ſailing inſtructions in a caſe circumſtanced like this? It is clear that ſailing inſtructions are not neceſſary in all caſes: but the deciſions authorize me in ſaying, that in general caſes they are required; and if that be ſo, I do not find any thing in the circumſtances of this caſe which can bring it within any of the exceptions to the general rule. In *Hibbert* v. *Pigou* (*c*), Lord *Mansfield* laid it down generally, that ſailing inſtructions are eſſential to convoy. Mr. Juſtice *Willes*, indeed, entertained doubts upon the ſubject; and Mr. Juſtice *Buller* declined giving any opinion upon that point. In that caſe, however, it was not neceſſary to decide whether ſailing inſtructions were eſſential or not; for though Captain *Mann* had neglected no means of obtaining ſailing inſtructions from the *Glorieux*, yet it did not appear, upon the firſt trial, that the *Glorieux* was a convoy appointed by government, and therefore the Court was obliged to hold that the warranty was not fulfilled. It is true that it was determined in

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(*a*) *Lethulier's* caſe, 2 *Salk.* 443.

(*b*) In *Lilly* v. *Ewer*, *Doug.* 74.

(*c*) *Park's Inſur.* 339.

Victoria v. *Cleeve*, where the convoy was appointed by government, that ſailing inſtructions may be diſpenſed with where no default appears on the part of the maſter. It being once decided, that a convoy within the terms of the policy means a convoy appointed by government, it ſeems to follow of neceſſity that the ſhip muſt depart with ſailing inſtructions, if by the due diligence of the maſter they can be obtained. The value of a convoy appointed by government, in a great meaſure ariſes from its taking the ſhips under control as well as under protection. But that control does not commence until ſailing inſtructions have been obtained; nor can it be enforced otherwiſe than by their means. Indeed, the reaſon of that rule which requires that the convoy ſhould be appointed by government, ſhews the neceſſity of having ſailing inſtructions; ſince without them the ſhip does not ſtand in that relation or under thoſe circumſtances in which ſhe can take the full benefit of the government convoy. If the fleet be diſperſed by a ſtorm, how is ſhe to learn the place of rendezvous? If it be attacked by the enemy, how is ſhe to obey ſignals? In ſhort, what communication can the protected have with the protecting force? It has been contended, that if ſhe be under the protection of the guns it is ſufficient. But will it be contended that, provided ſhe be under the protection of the guns at her departure, though ſailing inſtructions be never obtained during the voyage, or not till the laſt day of the voyage, the warranty is complied with? Either ſailing inſtructions are not neceſſary, or, if they be neceſſary, they muſt be ſo at ſome given period, and can only be diſpenſed with in ſome particular caſes. Then can any other period be aſſigned but the beginning of the voyage? Some of theſe affidavits ſay, that if the ſhip has obtained her ſailing inſtructions at any time before ſhe is loſt, it is ſufficient; but that ſhe muſt obtain them before ſhe is loſt. Are we then to depart from the terms of the contract between the underwriter and the aſſured, in order to let in a conſtruction which is at variance with the reaſon on which that contract is founded? Let us conſider the exceptions to the general rule which have been admitted. Reſpecting *Victoria* v. *Cleeve* there can be no difficulty, ſince the very ground of the deciſion in that caſe was, that there was no default in the maſter, and that no activity of his could have procured ſailing inſtructions, he having come out of the port of *Fleckery* in obedience to the ſignal of the convoy then off that port, and having been prevented from receiving ſailing inſtructions before

1800.

Anderson v. Pitcher & Ux.

fore the loſs of the ſhip, by the roughneſs of the weather. In *Webb* v. *Thompſon*, Mr. Juſtice *Buller*, with the aſſent of the Court, ſtated, with reference to a caſe ariſing out of the loſs which happened to this very ſhip, that, generally ſpeaking, unleſs ſailing inſtructions were obtained the warranty is not complied with; and the Court did not, at that time, ſee any circumſtance by which this caſe could be taken out of the general rule. The late Lord Chief Juſtice of this court, in his note-book, makes this obſervation on the caſe of *Webb* v. *Thomſon*:—"It ſeems to me that the ſingle queſ-
"tion is, Whether the ſhip departed with convoy? In fact ſhe
"ſailed with the fleet. Admiral Chriſtian diſtinguiſhed accurately
"between ſhips under protection of the fleet and ſhips under con-
"voy. All friends are protected while they are within reach of
"protection; but ſhips under convoy are, according to him, ſhips
"under control who can be ſpoken to in a language which they
"underſtand. They control them—would fire at them, if they
"miſbehave. The fact ſettled that it would raiſe the premium,
"would decide. It may make a difference in the premium, whe-
"ther the ſhip be under protection without control, or under pro-
"tection and control. It is neceſſary to inquire, therefore, whe-
"ther ſhe got ſailing inſtructions (which is the mode of putting
"herſelf under convoy), and when? It may ſeem a hard caſe to
"take advantage of a ſlip, but the nature of the contract is an an-
"ſwer. It is a contract founded in the conſideration of premium
"eſtimated by the riſk." Taking into conſideration the way in which the premium in theſe caſes is eſtimated, can we ſay that the underwriters have had the full benefit of the undertaking of the aſſured to depart with convoy, when in fact it was a mere matter of chance whether the *Golden Grove* would, under the circumſtances of her actual departure, ever be able to procure ſailing orders or not? The preſent caſe may indeed be decided without affecting the caſe of any other ſhip which ſailed with that convoy; ſince, if the captain of the *Golden Grove* had gone on board the frigate at nine o'clock in the morning of the 15th, he might have obtained ſailing inſtructions, and that he did not do ſo was his neglect. In the caſe of *Veedon* v. *Wilmot* ſailing inſtructions were not obtained; but it appears that they were applied for and refuſed while the convoy was in the *Downs*, the place of rendezvous. The ſhip, therefore, departed with convoy from the place of rendezvous, in the ſtricteſt ſenſe of the word. Indeed, the Court is bound to hold, that where

ſailing inſtructions are, under ſuch circumſtances, refuſed by the commander of the convoy, they are ſo refuſed for the benefit of the trade which is to be protected by the convoy. It is very uſual to refuſe to give them till the fleet is out at ſea; and we know that *La Motte*, who was hanged for giving intelligence to the enemy, got poſſeſſion of the ſailing inſtructions in conſequence of their having been given before the departure of the fleets. It is clear, therefore, that a ſhip is not bound to obtain ſailing inſtructions in the place of rendezvous at all events; but if they can be obtained by due diligence ſhe is bound to obtain them, becauſe it then appears that the convoy appointed by government decides, that under all the circumſtances of the caſe, the place of rendezvous is the place where they ought to be obtained. The principle of law which ſays that a convoy means a convoy acting under the orders of government, muſt operate in favour of thoſe who, without any neglect of their own, are not able to obtain ſailing inſtructions, becauſe they muſt obey the orders of that convoy which is ſuppoſed moſt capable, under all the circumſtances, of judging for the beſt. In a late caſe Lord Kenyon intimated a ſtrong opinion that ſailing inſtructions were eſſential where they could be had (*a*). Having now ſtated the exceptions to the general rule, it does not ſtrike me that the preſent caſe comes within any of them. (His lordſhip then went through the affidavits.) It appears to be the conſtant uſage for the commanders of convoys to give ſailing inſtructions to all ſhips which depart under their protection, whenever applied for. But the queſtion in this caſe is, Whether the warranty, that the *Golden Grove* ſhall depart with convoy from the place of rendezvous, has been fulfilled? It may be the duty of a commander to give inſtructions at all times; but that will not vary the contract by which the aſſured undertakes that the ſhip ſhall be ready to receive them at the place of rendezvous. It is ſtated, in one of the affidavits, to be the practice for the Admiralty to give orders to the commanders of convoys at *Spithead*, to get under weigh 30 hours after the wind has been fair, in order to give time for the ſhips in the *Downs* to come round; and that in caſe of blowing weather it may not be in the power of the ſhips which come from the *Downs* to obtain ſailing inſtructions previous to the convoy having ſet ſail. But if ſuch a caſe ſhould occur, it will remain to be conſidered whether it may not

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(*a*) *France* v. *Kirwan*, *Park. Inſur.* 342--6.

not be ſaid that the ſhip departed with convoy as far as the circumſtances of the caſe and due diligence on the part of the maſter, would admit. With reſpect to the caſe of a convoy being ordered to call off the ſeveral ports upon the coaſt, in order to enable ſuch ſhips as may be willing to join; it is exactly the caſe of *Victoria* v. *Cleeve*, where the ſhip being ordered by the convoy to leave the port without ſailing inſtructions, was excuſed on the ground of obedience to the orders of the convoy. In this caſe the ſhip did come round time enough to have received her inſtructions at the place of rendezvous, had the captain uſed due diligence in applying for them. Not being able, therefore, to repreſent to myſelf any principle of law, which could be ſtated to a jury as a foundation for a verdict in favour of the defendant, I think that the caſe muſt be decided on the general rule, which ought not to be infringed on account of any particular hardſhip which the Defendant may ſuſtain.

Per Curiam. Poſtea to the Plaintiff.

(In the HOUSE of LORDS.)

KNIGHT *v.* HALSEY; in Error.

Hops are, by law, titheable after they are picked from the bind. And no uſage can vary this rule. No evidence is ſufficient to ſupport a real compoſition, unleſs it have ſome reference to a deed of compoſition.

THIS was an action on the caſe brought by the Plaintiff in error in the King's Bench againſt the Defendant in error, as farmer of and entitled to the tithe of hops within the pariſh of *Farnham* in the county of *Surry*, for not taking away the tithe of hops from a certain cloſe in that pariſh, whereof the Plaintiff was occupier.

The declaration conſiſted of two counts. The firſt ſtated generally the Plaintiff's occupancy of the cloſe in queſtion, and the Defendant's right to the tithes, and that the latter neglected to take them away after they were duly ſet out. The ſecond varied from the firſt, by averring that the tithe was ſet out "according to the uſage and manner of tithing of hops in and throughout the ſaid pariſh lawfully uſed."

The cauſe was tried before *Hotham* Baron and a ſpecial jury at the *Surry* ſpring aſſizes, when a verdict was found for the Defendant, under the direction of the learned judge. To this direction a bill of exceptions was tendered, ſtating that at the trial the counſel for the Plaintiff in error gave in evidence:—"That the Plaintiff in error, on the 1ſt of *Auguſt* 1795, was occupier of the cloſe in queſtion, whereon hops were then growing, and that the Defendant in error was the farmer of and entitled to the tithe of ſuch hops; that within the pariſh and rectory of *Farnham* aforeſaid, for above 60 years before the 12th of *July*, in the fourth year of the reign of the late King *James* the Second, when the tithes of hops were not compounded for, the manner of ſetting out tithes of hops within the ſaid pariſh was as follows; that is to ſay, the occupiers, owners, and proprietors of lands within the ſaid pariſh planted with hops have uſed to ſet out every tenth row, whenever hops have been planted in equal rows, and where the ſame have not been planted in equal rows, every tenth hill of the ſaid hops ſo growing in the ſaid lands, and thereby to ſeparate and divide the tenth part from the other nine parts of the ſaid hops, and there to leave the ſame ſtanding with the binds uncut, for the uſe of the impropriator of the ſaid rectory, or his leſſee or farmer for the time being to come upon the ſaid lands, and in a convenient time there to cut the ſaid binds of the ſaid tithe-hops ſo ſet out as aforeſaid, and to pick the ſaid tithe-hops and carry away the ſame; That from the time when the occupiers uſed to ſet out their tithe in manner aforeſaid, till the year 1795, when the Defendant became farmer thereof, (being a period of 100 years,) the tithe of hops was compounded for throughout the pariſh at the rate of 20*s.* by the acre; That the Defendant is entitled to tithe of hops of the cloſe in queſtion, being field land; That in the ſaid year 1795 the ſaid hops ſo then growing in the ſaid cloſe were planted in unequal rows; That on the 17th day of *Auguſt* 1795 the Plaintiff gave the Defendant a notice that he was about to ſet out the tithe in kind; That in conſequence of a notice from the Defendant that he would take his tithe in kind, the tithe thereof was ſet out accordingly in the ſaid cloſe called *Round Cloſe*, by every tenth hill, leaving the binds uncut, and the tithe marked with a hole dug in the ground, and was fairly ſet out, and all the hills not bearing hops paſſed over and not counted; That on the 2d day of *September* following the Plaintiff gave the Defendant notice in writing that the tithe in queſtion was ſo ſet out; That on the 20th day of *October* following the Plaintiff gave a notice in writing to the Defendant to take away the ſaid tithe ſo ſet out as aforeſaid; That the Defendant did not take the ſame away, but left the tithe ſo ſet out ſtanding

1800.

Knight
v.
Halsey;
in Error.

ſtanding with the binds uncut, incumbering the Plaintiff's land for the ſpace of time in the ſaid declaration mentioned; That tithe of hops may be fairly ſet out by the tenth hill; That ſuch ſetting out is the moſt convenient mode and leaſt liable to fraud, and the general manner of manuring hop grounds is to ſpread the manure over the whole ground, for many hills will be weak, and many will die, and it is impoſſible to foreſee which; That hops will ſometimes intermingle on poles on the ſame hill, but ſeldom between one hill and another, and where they happen to do ſo they are eaſily ſeparated, and without any miſchief or injury thereto; That the manner of picking hops in the pariſh of *Farnham* is not to pick them into meaſures of a buſhel each, but they are picked in the firſt inſtance into three ſorts, called the bright, the middling, and the brown, of different qualities and values, which three ſorts grow upon the ſame bind; *viz.* the bright are the fineſt and beſt, the middling the next beſt, and the brown of inferior quality; the difference in value between the bright and the brown is in the proportion of 7*l.* 10*s.* for the bright, and 3*l.* 3*s.* for the brown *per* hundred weight; the hops are thus divided into three ſorts in the firſt picking from the binds into three different bags or baſkets at the ſame time, each containing upon an average eight or ten buſhels, and their reſpective contents are denoted by ſmall round black ſpecks or ſtreaks made on the ſides thereof, at different diſtances; but the bags or baſkets are not all of the ſame meaſure; That the pickers pick in families, as it is called; *viz.* in parties, in unequal numbers; ſome of which families pick much quicker than others, but all ceaſe picking at the ſame time, either on account of the approaching rain, which would ſoon ſpoil the hops when picked, or at meal times; That the average price of picking to be paid by the planter is two-pence *per* buſhel to each family of pickers, ſeparately and diſtinct from the others; That hops, in the pariſh of *Farnham*, are never meaſured, the pickers being paid according to the quantity denoted by the ſpecks or ſtreaks aforeſaid; but when the bags are full, or at the reſpective times of giving over work, the hops that are picked are immediately turned over from the bags into a ſurplice or ſheet, and carried from the ground to the oaſt to be dried; That it would be extremely prejudicial to meaſure them after picking, becauſe it would render it inconvenient to pick them into three ſorts, as aforeſaid, and in ſuch caſe it would employ the pickers an hour and an half extra, the flower of the hops would be bruiſed, and the bright hops turned to brown, to the great injury of the planter as well as the tithe owner himſelf; whereas by ſetting out the tithe by the hill, with binds uncut, in the manner above mentioned, the tithe owner, as well as the planter, may pick his hops into three ſorts, as aforeſaid, at his own convenient time, and enjoy all the other conveniencies above enumerated, as well as be enabled to take a tithe of the binds, together with the hops at the time of picking. It alſo appeared upon the reading of the anſwer of the Plaintiff in error to a bill filed againſt him by the Defendant in error in the court of *Chancery*, that the Plaintiff in error had admitted, that he believed it might be true that the introduction and firſt cultivation of hops in the ſaid pariſh of *Farnham* and elſewhere in this kingdom, were with reference to what is termed the legal time of memory, modern, and within the time of memory."

Judgment having been given in the *King's Bench* for the Defendant, in purſuance of the verdict (*a*), the Plaintiff brought his writ of error, and having annexed the bill of exceptions to the record, and aſſigned the common errors, ſubmitted that the judgment below was erroneous, and that a *venire facias de novo* ſhould be awarded, for the following among other Reasons:

1. Although the common law does in general preſcribe, that there ſhould be an uniform mode of ſetting out tithe, where no particular mode of ſetting out is eſtabliſhed by cuſtom, yet the cuſtom of a particular place may authorize or require a different mode from that in general preſcribed by the common law, if ſuch cuſtom be in itſelf reaſonable. And it has never yet been decided, that the mode of ſetting out tithe of hops by the tenth meaſure, as contended for by the Defendant in error, is the only legal mode of ſetting out ſuch tithe, nor is the particular mode contended for by the Plaintiff in error unreaſonable.

2. It has been determined, that the tenth land of grain may be ſet out ſtanding for the tithe of grain, *Stebbs* v. *Goodluck*, *Moor*, 913.; and in *Hide* v. *Ellis*, *Hob.* 250, it is ſtated as coming from the Court, that in many places they ſet out the tenth acre of wood ſtanding, and ſo of graſs.

(*a*) This verdict was found upon a ſecond trial; a verdict had before been given for the Plaintiff, and the Court of *King's Bench* thinking that verdict contrary to law, awarded a new trial. For the arguments of Counſel and opinion of the Court upon that occaſion, ſee 7 *T. R.* 86.

3. The evidence in the former cauſe of *Chitty* v. *Reeves* (*a*), and in the litigation between the preſent parties, is uniform to ſhew, that in the pariſh of *Farnham* the tithe of hops, when ſet out, was ſet out by the tenth row, if equal, or elſe the tenth hill. How long that cuſtom or uſage had actually prevailed, it is not now poſſible to make out; but if it was not an immemorial cuſtom (which is not ſo devoid of foundation as has been generally ſuppoſed) it might at leaſt have had its commencement at a time when it was competent to the rector and vicar, with the conſent of the patron and ordinary, to make a binding agreement that the tithe ſhould be ſet out in the way it has been. It was on ſuppoſition of ſome agreement ſo made, accompanied with the uſage, that the court of *Exchequer*, in the ſuit inſtituted ſome time ſince by the vicar, claiming the tithe of hops planted in fields, adjudged the tithe of hops to belong to the rector, though the vicar took thoſe in the reſt of the pariſh.

4. The evidence adduced by the Plaintiff in error proves two eſſential things: firſt, That the tithe of hops may be ſet out fairly by the tenth row or hill; and, ſecondly, That the obliging the occupiers of lands in *Farnham* (where hops are, in the picking of them, managed in a peculiar manner,) to ſet out the tithe of the hops by meaſure would be difficult, attended with additional expence and great delay, and very injurious to the hops themſelves, and materially affect their prices when ſold.

5. The prior caſes of *Gee* v. *Perch* (*b*), *Bliſs* v. *Chandler* (*c*), and *Walton* v. *Tyers* (*d*), were totally different from the preſent; and the defences were in them all ſo unfounded, and the manner in which the Defendants themſelves had before ſet out their tithes was ſuch, that the Court could not do otherwiſe than decree an account of the tithes as having been ſubtracted; and no one of the caſes made it neceſſary for the Court to declare, that, by law, hops were to be picked before the tithes were ſet out.

J. Mansfield.
William Adam.

The Defendant in error ſubmitted, that the directions of the Judge were right and according to law, and that the verdict and judgment ought to be affirmed for the following amongſt other

Reasons:

(*a*) Upon the former trial copies of the proceedings in this cauſe, together with the decree of the Court of *Exchequer* thereon, were read. For the ſubſtance of the proceedings and decree, ſee 7 *T. R.* 87.

(*b*) *Vin. Abr. Diſmes*, Y. pl. 3. in margin. See alſo 7 *T. R.* 90. *in notis.*

(*c*) See *Vin. Abr.* and 7 *T. R.* *ubi ſupra*; alſo, *Burn*, *Eccleſ. Law*, Tithes, *ſect.* 7.

(*d*) *Burn*, *Eccleſ. Law*, *ubi ſupra*, and *Brown*, *P. C.* 99.

1800.
Knihgt
v.
Halsey;
in Error.

1. That the common law rule for ſetting out the tithe of hops, in many inſtances, hath been determined, and more recently after the moſt ſolemn argument, hath been adjudged, and is now clearly ſettled, that the tithe ſhall be ſet out by meaſure, after the hops are picked from the bind or ſtem; for that hops are not titheable until after they are picked, at which time, but not before, the tenth part is ſeverable from the other nine parts.

2. To the validity both of a *modus decimandi* being a compenſation which muſt have originated prior to the time of legal memory, and alſo of a compoſition real being a compenſation which may have originated ſince that æra, but not after the reſtraining ſtatutes paſſed in the reign of Queen *Elizabeth*, a conſideration or *quid pro quo* is indiſpenſibly neceſſary. A compenſation, be it either ancient or modern, whereby part of the thing is given in lieu of the whole, or whereby a thing is given in a leſs perfect ſtate than the law enjoins it to be given, unleſs ſomething be added to make it equal to the value of the real tithe, carries internal evidence to deſtroy itſelf, and is conſidered as being rank, and therefore void. The compenſation here contended for by the Plaintiff in error, whether commencing in ancient or modern times, whereby nothing more than the tenth part of the hops before picking is to be given, without adding any thing to make it equal to the greatly advanced value of the real tithe, which the law enjoins, ſhall be ſet out after picking, or for the conſiderable coſts the occupier incurs in bringing the article into the more perfect ſtate, and to the benefit of which the tithe-owner is by law entitled clear of all expence, muſt be *felo de ſe*, and as being rank, is void.

3. A cuſtom muſt be preſumed to be as old as the time of legal memory; and, when that preſumption is refuted by any circumſtance that ſhews it could not have exiſted during the whole of that period, the cuſtom is deſtroyed. No mode of tithing hops can have exiſted from the time of legal memory, becauſe the cultivation of hops within the kingdom is of a date long ſubſequent to it, and of this all the courts of *Weſtminſter* Hall have taken judicial notice, and in conſequence have uniformly decided againſt all cuſtoms that ever have been attempted to be ſet up relative to the tithing of hops.

4. The mode of tithing contended for by the Plaintiff in error cannot be ſupported as a local cuſtom peculiar to the pariſh of *Farnham*; becauſe, beſides the evidence which the records of the judgments of courts of law furniſh againſt its antiquity generally

throughout the kingdom, it is ſtated on the bill of exceptions that the introduction and firſt cultivation of hops within the pariſh and rectory of *Farnham* is with reference to the time of legal memory, modern, and within the time of memory.

5. Notwithſtanding the evidence adduced by the Plaintiff in error, theſe facts cannot be denied—that the hops on different hills, as well as in different rows, are ſo unequal both in quantity and quality, that the tenth of either of them bears no proportion to the tenth of the whole produce; that tithing by the hill or row is liable to great frauds; that taking the tithe by either of theſe modes would in all caſes be very inconvenient and in many quite impracticable; whilſt, on the other hand, the fairneſs, convenience and juſtice of ſetting out the tithe by meaſure, after picking, in experience, have been ſo fully proved, as to render this mode of tithing part of the common law of the land.

6. A cuſtom to ſet out the tithe by the tenth row, if equal, or by the tenth hill, if unequal, ought not to have been permitted to be proved in this cauſe; becauſe the Plaintiff in error has not, in his declaration, ſtated, that there was any ſuch cuſtom, or that he had ſet out his tithes, which are the ſubject of his complaint, according to any ſuch cuſtom, and therefore the exiſtence of ſuch cuſtom could have no relation to the matter in iſſue between the parties.

JOHN SCOTT,
WM. GARROW.

This caſe was argued on *February* the 25th and 27th, by *Mansfield* and *Adam* for the Plaintiffs in error, and by the *Attorney General* (a) and *Hall* for the Defendant in error. After the argument, the queſtion put to the judges was, Whether upon the matter ſet forth in the bill of exceptions, the direction to be given to the Jury ought to have been, to find for the Plantiff, or for the Defendant?

The Judges deſired time to conſider of their opinions; and on two ſubſequent days delivered them *ſeriatim*, there being a difference upon the Bench. *Rooke* J. was of opinion, that the direction ought to have been in favour of the Plaintiff; and *Chambre* Baron, *Le Blanc* J. *Lawrence* J. *Thompſon* B. *Groſe* J. *Heath* J. and *Macdonald* Ch. B. held that it was rightly given in favour of the Defendant.

ROOKE J.—The queſtion propoſed by your Lordſhips is, Whether, upon the matters ſet forth in the bill of exceptions, the direction

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(a) Sir *John Mitford*.

KNIGHT *v.* HALSEY; in Error.

tion to be given to the Jury ought to have been, to find for the Plaintiff, or for the Defendant?

According to my view of this caſe, the anſwer to this queſtion muſt depend on the opinion the Jury would have formed as to the facts here ſtated.—If the Jury were ſatiſfied that the facts ſtated in the bill of exceptions were ſufficiently proved, my opinion is, that they ought to have found a verdict for the Defendant.

Though I am ſo unfortunate as to differ from the Lord Chief Baron and all my brethren on this queſtion, yet I flatter myſelf that we do not materially differ as to firſt principles, but rather as to the application of them. I agree that, where no practice has prevailed to the contrary, the general law of tithing hops is by the meaſure; that a ſtrict legal cuſtom muſt be immemorial; that according to the doctrine laid down in our books, hops are of modern cultivation, as an article of huſbandry, and cannot be the ſubject of a ſtrict legal cuſtom. But, I think,

1ſt, That the general law of tithing hops has been eſtabliſhed with a catious regard to the uſage of ſuch particular pariſhes wherein a reaſonable and convenient uſage has obtained.

2dly, That ſuch reſtriction on the general law is not illegal, nor contrary to the principles of tithe-law.

3dly. That the uſage ſet up by this pariſh of *Farnham* may be ſupported without violating any legal principle.

1. As to the general law of tithing hops.

The wild hop is probably an indigenous plant: but though indigenous, yet if it firſt became an article of cultivation within time of legal memory, it ſeems agreed, that no cuſtomary uſage as to tithing it can be ſupported againſt the general rule of law. In the caſe of *Crouch* v. *Riſden* (as reported in 1 *Sid.* 443.) the Court deny that there can be a *modus*, by way of preſcription, to pay ſo much for tithe-hops, and ſay, they will take notice that hops are not ſo ancient, but were uſed in beer only of late times, notwithſtanding the records cited by Lord *Coke* to the contrary. In juſtice to Lord *Coke*'s memory it ſhould be obſerved, that the paſſage alluded to in Lord *Coke*'s work is miſrepreſented by the reporter. Lord *Coke* cites 12 *Ed.* 4. *c.* 8. as to thoſe who had purchaſed licences patent to be correctors of ale, beer, wine, *&c.*; and has this note in the margin of the 4 *Inſt.* 262. "*Nota*, By this ap-"peareth that beer is not of ſuch late time as ſome ſuppoſe. "See alſo *Rot. Parl.* 4 *H.* 4. No. 53. Beer and ale mentioned "to be then in *Calice*. Beer is a *Saxon* Word, *Bier*; and Beer

" is within the word *Cerviſia* in the ancient ſtatutes. For it is " but as the putting a new button to an old coat, *viz.* hops to " malt and water, to make it continue the longer." According to this paſſage, the putting hops to beer was conſidered by Lord *Coke* as of modern practice in his time: whereas the reporter repreſents him as ſaying the contrary. The ſame caſe (*Crouch* v. *Riſden*) is reported 1 *Ventr.* 61. and the reporter makes the Court ſay, " there could be no ſuch compoſition time out of mind; hops not being known in *England* till Queen *Elizabeth*'s time; for then they were firſt brought out of *Holland*; though beer is mentioned in a ſtat. of *H.* 4." This account of the introduction of hops is certainly inaccurate, for we find, that hops were known before 1562; for they had attracted the notice and encouragement of the legiſlature at that time, as appears by 5 & 6 *Ed.* 6. *c.* 5.

We have then the authority of Lord *Coke*, that the uſe of hops in beer is of modern introduction: and ſupported by the authority of this paſſage in 4 *Inſt.*, and of theſe very inaccurate reports of the caſe of *Crouch* v. *Riſden*, the modern authorities uniformly conſider it as ſettled, that hops were firſt cultivated within time of legal memory, and that they cannot be the ſubject of immemorial cuſtom. Yet I cannot but obſerve, that as the hop is probably indigenous, and as (if the reporters are correct) the Court were certainly not aware how long the hop had been an article of cultivation, the judicial notice which they took of its modern introduction ſeems to have a ſlight foundation. To aſcertain ſatisfactorily the law as to tithing hops, it may not be amiſs to ſtate, in hiſtorical order, the ſeveral caſes which are reported on this ſubject. The earlieſt caſe we have in our books, reſpecting hops, is cited in *Hutton*, 78., it was 3 *Jac.* 1. between *Potman.* Knt. and another. The queſtion was as to the nature of the tithe, and adjudged to be a great tithe: but as for hops in gardens and orchards, they were adjudged to the vicar as *minutæ decimæ.* In *Hil.* 14 *Jac.* 1. *B. R.* (1616), it was ſaid by *Hitcham*, Serjt. and agreed by *Mountacute* (who was then Ch. Juſtice), that a man may ſet forth a tenth part of hops for tithes, *before they are dried*, 1 *R. Abr.* 644. tit. *Diſmes* (Y), *pl.* 3. between *Barham* and *Gooſe.* From this *dictum* of Serjt. *Hitcham*, as to ſetting forth the tithe before they are dried, it ſeems pretty clear, that the ſetting forth the tithe by meaſure was practiſed in ſome countries at that time; though we know not how generally. But, on the other hand, if the law of tithing hops by the tenth meaſure after picking was the general rule from the time they were firſt cultivated, it ſeems difficult to ſay by what analogy the tithe of the mere flower of the hops was ever conſidered as a *great tithe.*

Hops were an article of general cultivation before the reign of *Car.* 1.; for in the caſe of *Uvedale* v. *Tindall*, *Hutton*, 77. 1 *Car.* 1. the Court ſay, "In ſome countries a great part of the land within "the pariſh is ſown with hemp or hops." In 1629, 4 *Car.* 1. *Trin. B. C. Alfrey* v. *Mills*, the Court held that where there was a *modus* for a garden, hops growing in a garden were within the *modus*, provided that they did not grow in any addition to the garden. From theſe caſes we may ſafely infer, that hops were an article of general cultivation ſo early as 4 *Car.* 1. and that there had been ſeveral litigations as to the nature of the tithe, whether great or ſmall, and as to the claiming of a *modus decimandi.* In the caſe of *Legard* v. *Elcock*, (1666,) *Paſch.* 18 *Car.* 2. *B. R.* on a queſtion as to the mode of ſetting forth tithe of corn the Court ſay, (according to the report of 2 *Keble*, 36.) that the cuſtom of *England* is, to ſet forth in ſheaves, but each county hath ſeveral ways, as of hops, which, by *Keeling*, (then Ch. J. of *B. R.*) is a ſmall tithe, and payable by the pole. What Lord Ch. J. *Keeling* is here reported to have ſaid as to the nature of the tithe is now conſidered as law; for, notwithſtanding the caſe cited in *Hutton*, 78. hops are now held to be a ſmall tithe: according to the report of the ſame caſe, 1 *Sid.* 283. under the name of *Ledger* v. *Langley*, *Twyſden* J. ſaid, that it has been queſtioned, and is not now known, how the tithe of hops ſhall be ſet out, *ſcil.* by the tenth pole or by meaſure. And in the caſe of *Crouch* v. *Riſden*, *Hil.* 21 & 22 *Car.* 2. *B. R.* (1670,) 1 *Sid.* 443. the reporter adds, note *per Twyſden* J. (who lived in *Kent*); It is a queſtion at this day how hops ſhall be tithed, Whether by the hill, or by the pole, or by the buſhel? I have been the more particular in deducing the caſes thus in chronological order, becauſe I think it muſt appear clearly from them, that from the firſt cultivation of hops, which was before A. D. 1551, till after 1670, a period of above 120 years, though hops had for a long courſe of time been an article of general cultivation, no certain mode of ſetting forth the tithe of them had been eſtabliſhed; conſequently, we may preſume that different modes prevailed in different pariſhes, and perhaps in different parts of the ſame pariſh, and ſome particular modes might have prevailed in particular places for a very long courſe of time, even from the firſt cultivation of the hop. The tithe owner received his tenth and had a right to his tithe in kind; no *modus decimandi* was allowed; but

as

1800.

Knight v. Halsey; in Error.

as to the *modus exponendi*, or mode of ſetting it forth, various practices prevailed. This diſtinction between the *modus decimandi*, and the *modus exponendi*, was taken by *Lindley*, who was counſel againſt the prohibition in the caſe of *Ledger* v. *Langley*, and ſeems to me to be a ſound diſtinction. In *Hob.* 107. *Wilſon* v. *The Biſhop of Carliſle*, 13 *Jac.* on a queſtion, Whether a cuſtom was good to tithe wool truly without view of the parſon? Lord *Hobart* holds it bad, and ſays, "The law provides that you have your "right, and therefore that your means be ſuch as is likely to "produce it." Here is a diſtinction between the right and the means whereby that right may be obtained; *i. e.* between the right to the tenth and the means whereby that tenth may be aſcertained and ſet forth. And the doctrine laid down by the Court in the caſe of *Hyde* v. *Ellis* is to the ſame effect; that tithe naturally is but the tenth of the revenue of my ground, not of my labour and induſtry, where it may be divided. If, therefore, a mode could be deviſed by which the tithe owner may receive the tenth of the produce of the hop grounds, and the ſame may be conveniently ſet forth, I feel no abſolute neceſſity for requiring the former to ſet it forth by meaſure. The *modus exponendi* may vary, provided the tenth is received in kind.

The law of tithing hops being thus unſettled till ſo late a period, let us ſee when the law was ſettled, and what law was ſettled on the ſubject. From the *dictum* of *Hitcham*, Serjt. 1616, till the caſe of *Chitty* v. *Reeve*, 1687, I am not aware of any deciſion or even of any *dictum* in our books, which aſcertains or even ſuggeſts how the manner of ſetting forth this tithe is ſettled. That caſe ſtates how the law was ſettled, and is cited by Mr. *Ward* in the caſe of *Bake* v. *Sprackling*, *Scacc.* 1717, (*Bunbury*, 20.) as having ſettled the law on the ſubject; *viz.* that tithes of hops are not to be paid till after they are picked and before they are dried, every tenth meaſure. *Bunbury* in a note ſays, that the tithing of hops was ſettled in the caſe of *Bliſs* v. *Chandler*, 1720.: but in this he is inaccurate; for in reading the decree in *Chitty* v. *Reeve*, no one can doubt that the general law was there aſcertained, and that ſubſequent caſes have only ſerved to confirm the law there ſettled, without impeaching any thing there laid down; nor has that caſe ever been impeached till the preſent difficulty was ſtarted. It ſeems, therefore, of great importance to the deciſion of the preſent queſtion, to examine accurately what was the law laid down by the Court of *Exchequer* in that caſe. The Court were fully appriſed of the terms of this cuſtom, of the miſchiefs of cutting the binds, and not tithing by meaſure after picking, and that by the law of the land, tithe hops ought to be paid in kind; *viz. the tenth part of the whole after picking:* yet the Court declares in favour of the uſage, and makes a decree to the following effect: "It fully appearing to the Court that the cuſtom uſage or practice "of paying tithe hops in the pariſh of *Farnham* for above 60 "years paſt hath been that the impropriator hath had the tenth "row when equal, or elſe the tenth hill, that the ſame hath been "left ſtanding with the hop binds uncut, that the impropriator "hath always had convenient time to come and cut the binds "and to pick the hops on the ground; the Court was of opinion "and declared the ſaid cuſtom uſage and practice to be reaſonable "and fitting to be obſerved, and the Court declared that in caſe "*there was not any ſuch uſage*, the tithe of hops ought to be paid "in kind, *viz.* the tenth part of the whole after picking." Thus in the very firſt caſe in which we have any account that the law of tithing hops is ſettled, we have alſo an account of an uſage allowed to ſtand againſt it. Words cannot expreſs more plainly that according to the opinion of the Court of *Exchequer*, an uſage or practice if convenient and fitting to be obſerved, ought to be eſtabliſhed againſt the common law right which was now declared to be, by the tenth of the whole after picking. It was objected in the argument that this uſage was ſet up by the executor of a leſſee for a ſhort term, who could not bind the right of his landlord; but let the uſage be ſet up by whom it might, it was diſputed by the occupier; and if the Court had thought that no uſage could ſtand againſt the general law of tithing hops as it was then held to have been ſettled, they were bound to have declared againſt the uſage.

When the law was ſettled we do not preciſely know, but this caſe declared that it was ſettled and how it was ſettled. With reſpect to the *modus exponendi* thus eſtabliſhed, I cannot but make this obſervation, that it ſeems to have been adopted on a principle of convenience only; for it certainly is not a regular legitimate mode of tithing; it gives the tithe-owner the flower of the hop only, and it withholds from him the ſtalk; though, according to the courſe of huſbandry as to hops, the bind is firſt ſevered, and then the hop is picked. By a ſort of compromiſe for convenience ſake, it takes from him the ſtalk, to which he has a ſort of legitimate right from the moment of ſeverance, and gives him the benefit of the planter's labour and expence in picking, to which, according

1800.

KNIGHT *v.* HALSEY; in Error.

according to the principle laid down in *Hob.* 250. he has no right at all.

I am aware that, ſince the hop has been decided to be a ſmall tithe, attempts have been made to put it, by analogy, on the ſame footing as the tithe of fruit. The bind is likened to the branch of a fruit tree; and it is ſaid, that the parſon is only entitled to the fruit, and that as the farmer may not pluck off a bough and give it to the parſon and bid him gather the fruit, ſo neither ought the farmer to cut the bind and leave the parſon to pluck the hop.—This may be ſimilitude; for there are ſome faint traits of reſemblance, but it certainly is not *analogy*; becauſe it is defective as to the main circumſtance, the common courſe of huſbandry.

The conſtant courſe of huſbandry is to ſever the bind; but by no courſe of huſbandry is it uſual to cut the branches off the fruit trees. Should a farmer cut his binds and refuſe to pick his hops, I think it probable that our courts of law would hold this to be ſo far a ſeverance as to intitle the tithe-owner to ſomething, if he thought it worth his while to claim it; or ſhould it happen that, by any courſe of huſbandry, the binds were ſevered on one day and not picked till the next, and ſhould the tithe-owner die in the intermediate time, I think it probable our Courts would conſider this as a ſeverance, and give the tithe to the executor, becauſe *the ſeverance is according to the courſe of huſbandry*. In ſhort, I conſider this *modus exponendi* as peculiar, as not reconcilable by analogy to any prior mode of ſetting forth, as founded ſolely on the peculiar nature of the ſubject matter, and as ſettled on a principle of convenience only; and if the court of *Exchequer*, proceeding upon this principle, has alſo held, that where a convenient uſage has long prevailed in a particular pariſh, it ſhall be eſtabliſhed againſt the general principle of convenience, where no uſage is ſet up: I do not feel myſelf warranted, or diſpoſed to ſay, that the Court has done wrong. I conſider the Court of *Exchequer* as proceeding with great and laudable caution in ſettling this point of law, aware of the great length of time during which the law had been unſettled, and aware of the poſſibility that particular practices might have prevailed in particular pariſhes, which were reaſonable and fitting to be obſerved; but that where there is no ſuch uſage the general rule muſt prevail. Since the caſe of *Chitty* v. *Reeve*, this point has never come directly in queſtion till the preſent caſe. Several caſes have been litigated as to the tithe of hops; in none of which the doctrine laid down in *Chitty* v. *Reeve* has been denied; but in ſome of which it has been affirmed. In

1800.

Knight v. Halsey; in Error.

the two caſes of *Gee* v. *Pearch*, 1698 and 1704, 1 *Wood*, 386. 439. (*a*) the Court declares, that hops ought to be picked and gathered from the bind before they are tithed. This had been already ſettled in the caſe of *Chitty* v. *Reeve*, and was no new doctrine; the cuſtom ſet up in the firſt of theſe caſes, in 1698, was that 10*s.* an acre ſhould be paid for the tithe of hops; ſuch a cuſtom was void according to the principles laid down in *Crouch* v. *Riſden*, 1 *Sid.* 443.; but this cuſtom reſpected a modus in diſcharging of tithe, not the manner of ſetting it forth. The caſe of *Bliſs* v. *Chandler*, 1720, 2 *Wood*, 148. reſpected the manner of ſetting forth the tithe of hops: but the Defendant ſet up no cuſtom; he had paid tithe of early hops by the buſhel, after they were picked, and the remainder by ſtripping the binds from every tenth pole or hill, and leaving them on the ground for the Plaintiff to pick. The Court ſay, tithe muſt be paid by every tenth *buſhel* of the whole after they are picked. Here the Defendant had ſet forth his tithe in two different ways, but alleged no cuſtom in ſupport of either; the Court, therefore, did not decide any point as to cuſtom, but declared the general law. The next caſe that is reported on this ſubject is the caſe of *Sneyd* v. *Unwin*, *January*, 1740, 2 *Wood*, 403.—The rector of *Heddingham Sible* in *Eſſex*, claimed the tithe of hop, by receiving, on the hop-grounds where the ſame ariſe, the tenth meaſure or weight after they are plucked from the ſtalk, and before they are dried and packed. The Defendant ſet up *an ancient uſage*, whereby the rectors are obliged to accept their tithe hops by the tenth pole or hill, after the vines are ſevered from the ground and ſtripped off the poles; and that the ſaid rectors were, and the Plaintiff was obliged, to pick all his tithe hops. Here was an ancient uſage ſet up leſs favourable to the rector than the uſage ſet up in the caſe at bar; becauſe it was to ſever the binds from the ground and to ſtrip them off the poles; yet the Court did not pronounce againſt it *a priori*, and ſay, it was technically impoſſible that any uſage could be ſupported againſt the eſtabliſhed right. The Court was very deliberate in its proceedings. It heard the counſel, it read the proofs, it read the ſeveral decrees in *Chitty* v. *Reeve*, in the two caſes of *Gee* v. *Pearch*, and in the caſe of *Bliſs* v. *Chandler*, and with this *full information* before them, it directed an iſſue to be tried by a ſpecial jury, Whether, by the uſage in the pariſh of *Heddingham Sible*, hops are to be tithed before they are picked from the ſtalk? This caſe has great weight with me: the Court had the caſe of *Chitty* v. *Reeve*,

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(*a*) *Vid. etiam Vin. Ab.* tit. *Diſmes* (Y), pl. 2.

Reeve before them, as well as the other caſes; they were well appriſed of the general iſſue on uſage at large. Had they not thought that, according to the caſe of *Chitty* v. *Reeve*, uſage might ſtand againſt the general law, and yet they directed this iſſue. Muſt not a plain man infer from hence, that, according to the opinion of that court, an uſage to tithe hops before they are picked from the ſtalk might, under ſome circumſtances, be ſupported againſt the general rule?

It is obſervable that the Court did not direct an iſſue on the particular cuſtom, ſet up by the Defendant, but a more general rule; they ſurely would not have directed ſuch an iſſue. And if any uſage whatever could be ſupported againſt the law then generally eſtabliſhed, then this caſe is an additional authority to ſhew that the technical objection made to the uſage now ſet up, ought not to prevail. On the trial of this iſſue the jury found a verdict *againſt the uſage.* In the year 1752 the rector filed his bill againſt the ſon of the former Defendant *Unwin*; the Defendant anſwered to the ſame effect, as to the cuſtom of tithing hops as his father had done in the former cauſe; the Court declared that the method of tithing hops inſiſted on by the Defendant, is not the legal method of tithing hops; but that they ought to be picked and gathered from the binds or ſtalks before they are titheable, 2 *Wood*, 478. There can be no doubt that this decree was right; the queſtion as to uſage had been tried, and the jury had found againſt it, and there being no uſage the method ſet up by the Defendant was not the legal method. The next and laſt caſe in point on the ſubject is, the caſe of *Walton* v. *Tyers*, *in Scacc. February* 1753, and ultimately decided in this houſe (*a*). This caſe is relied on as having finally ſettled the point as to the mode of tithing hops. I do not underſtand this caſe to have ſettled any point which was not well known before. From the caſe of *Chitty* v. *Reeve* the deciſions had been uniform, that the tithe of hops is to be ſet out after they are picked, and before they are dried, unleſs in pariſhes where there had been an uſage to the contrary: on the point of uſage there were two caſes which ſeemed very ſtrongly to allow its validity; and on this point the caſe of *Walton* v. *Tyers* decides nothing. According to the account of this caſe, in 2 *Wood*, 484, the Defendant, in his anſwer, diſputed the general rule of law, and inſiſted, that the tithe-hops ought not, by law, to be ſet out *after they are* picked from the bind or ſtem, and he *denied that there was any cuſtom*, in either of the *pariſhes*, for ſetting out the

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(*a*) *Vid.* 5 *Bro. P. C.* 99. 3 *Burn's Ecc. Law*, 450.

tithe of hops. So that, though the court decides nothing on the queſtion of cuſtom, it ſeems as if thoſe who adviſed the parties in their pleadings thought that cuſtom or uſage might be material in the caſe.

On theſe authorities, and for theſe reaſons, I am of opinion, that according to the law eſtabliſhed for tithing hops, the general rule that hops are to be tithed by meaſure after they are picked, and before they are dried, has not been eſtabliſhed ſo peremptorily and ſtrictly as to deſtroy or to diſturb ſuch reaſonable and convenient uſages as have prevailed uninterrupted, and for a long courſe of time, in particular places; but has been eſtabliſhed with due caution and circumſpection, and ſubject to ſuch uſages.

My ſecond propoſition is, that the law ſettled as above ſtated, with a reſtriction as to local uſages, is not contrary to the principles of tithe-law. And ſo far is it from being contrary to theſe principles, that it is in ſtrict analogy with them. The manner of ſetting out the tithe of every titheable article has been, for the moſt part, long known and ſettled; yet there are many articles which local uſage regulates the mode of ſetting forth. In *Hob.* 250. *Hide* v. *Ellis*, 16 *Jac.* it is ſaid, "In divers places they fell out the tenth acre of wood ſtanding, ſo of graſs." This ſhews at leaſt the opinion of the Court, that the *modus exponendi* may be regulated by the cuſtom of the place. In 2 *Keble*, 36. *P.* 18 *Car.* 2. *Legard* v. *Elcocke*, the Court are reported to have ſaid, on a queſtion of tithe-corn, "The cuſtom of *England* is, to ſet forth in ſheaves; but each country hath ſeveral ways, as of hops." In *Holberch* v. *Whadcocke*, *P.* 13 *Car.* 2. *Scacc. Hardr.* 184. it is ſaid, agiſtment tithes for barren cattle are due *de communi jure*, according to the value of the land, after the rate of 2*s.* in the pound; for that they cannot be otherwiſe valued, or accounted for, becauſe the profits of the land for which they are paid are perceived by the mouths of beaſts: but, by cuſtom, or preſcription, they may be paid in other manner, as, by the acre, or for all manner of cattle barren, and for the plough and pail. So in *Hicks* v. *Woodſon*, *M.* 6 *W.* & *M.* *B. R.* as reported in *Skinner*, 560. *Holt* Ch. J. ſays, Tithes for barren cattle are due *de communi jure*, and 2*s.* in the pound is the uſual tithe of common right, but that there are divers cuſtomary manners of tithing for them.

In addition to theſe authorities, the law as to tithing milk is a complete proof that the cuſtom of the place may regulate the mode of ſetting forth tithe. The common law right has been finally

1800.

Knight
v.
Halsey;
in Error.

finally ſettled by very modern caſes; but it has been ſettled with a due regard to all the local cuſtoms which have prevailed in different pariſhes. The caſe of *Stebbs* v. *Goodluck*, *Moor*, 913. 1 *Leon.* 99. *P.* 30. *Eliz. B. R.* appears to me very material to this point. The cuſtom there ſet up was, that the parſon ſhall have for his tithe the tenth land ſown with any manner of corn, and he ſhall begin his reckoning always at the firſt land which is next the church. The parſon ſhewed, that the Defendant, by fraud and covin, ſowed every tenth land, which belonged to the parſon, very ill, and with ſmall quantity of corn, and did not dung or manure it as he did the other nine parts, by reaſon whereof the other nine yielded each eight cocks, and the tenth yielded but three cocks. The parſon libelled in the Spiritual Court, and confeſſed the cuſtom; but for abuſing the cuſtom prayed the tithe in kind: the Defendant prayed a prohibition, and the parſon afterwards a conſultation. And the opinion of *Wray* Ch. J. was, that the cuſtom was againſt common reaſon, and ſo void, but if it be a good cuſtom then the parſon ſhall have his action on the caſe. This is the report in 1 *Leon.* The caſe is alſo reported in *Moor*, 913. who ſays, that a prohibition was awarded, notwithſtanding the covin, for the fraud may be remedied in an action on the caſe at common law. Whether a conſultation was afterwards granted does not appear from either report: but, it is ſaid, in argument, by counſel, 2 *P. Wms.* 569. (*Chapman* v. *Monſon*, *Hil.* 1729.) on what authority I know not, that a conſultation was granted on *Wray* Ch. J.'s opinion. This caſe furniſhes obſervations very applicable to the caſe at bar.

1ſt, *Wray* Ch. J. declared his opinion immediately on the argument, that the cuſtom, though confeſſed and ſet up, as in the caſe of *Chitty* v. *Reeve*, by the parſon, was againſt reaſon, and ſo void. He did not (as the Court of *Exchequer* are ſuppoſed to have done in the caſe of *Chitty* v. *Reeve*) ſuffer a cuſtom to be ſet up under the ſanction of the Court, which he thought to be void: but he declared his opinion directly; and I am diſpoſed to think with equal favour of the Court of *Exchequer* in 1687, that had they thought no uſage could prevail againſt the general right, they would have declared ſo, notwithſtanding the uſage was confeſſed and ſet up by the impropriator. 2dly, Suppoſing *Wray* Ch. J.'s opinion to have been the opinion of the whole Court, it does not affirm that a cuſtom to tithe the tenth part of corn growing upon the land is bad; but it affirms this, and this only, that a cuſtom to tithe the tenth land of corn, beginning at one certain land, is void; becauſe it is open to the fraud of manuring and ſowing the parſon's land worſe than the others. And, according to this diſtinction, the law is laid down in *Watſon's Clergyman's Law*, *c.* 49. *page* 549. "If the cuſtom "of the place be to meaſure forth to the parſon the tenth part of "the corn ſtanding, this manner of tithing is, I conceive, to be "obſerved, and the parſon muſt ſit down by it." Mr. *Bohun*, in his *Law of Tithes*, *chap.* 2. ſays the ſame, and adds, it ſeems to me, ſuch a cuſtom or preſcription may have a reaſonable foundation on this ſuppoſal, that the field where thoſe lands or ridges lay, was originally a common waſte field belonging to the townſhip; and that, on agreement of the pariſhioners to turn it into arable, they conſented to allot the tenth land or ridge by them ſown to the parſon, but he to reap it. If there be any weight in this obſervation by Mr. *Bohun*, it applies very ſtrongly to the caſe now before the houſe; for *pari ratione* it might be agreed in this pariſh of *Farnham*, that the pariſhioners ſhould turn their lands into hop grounds, and conſent to allot the tenth row or hill to the parſon, and he to ſever and pick the hops, and to have convenient time for this purpoſe. It ſeems not ſettled at this day what ſhall be ſufficient evidence to warrant a jury to find ſuch an agreement; but if a jury may preſume a grant or agreement from uſage only, then they may preſume that in this pariſh. An agreement may have been made before the reſtraining ſtat. of 13 *Eliz. c.* 10, and by conſent of the proper parties, namely, the parſon, patron, and ordinary. For we know that hops were an article of huſbandry before the 5th and 6th of *E.* 6, (35 years before); and *Hob.* 297. ſays, that a grant of a parſon, patron, and ordinary, is good without any recompenſe. There is a report 2 *Leon.* 70. of an anonymous caſe, *Hil.* 24 *Eliz. B. C.* which certainly countenances this doctrine of tithing by the tenth land. "By the civil law the parſon ought to have his tithe by the tenth ridge, and in a great field there was corn upon the arable, and graſs upon the head lands, and in a ſuit for tithe-hay and rakings of the corn, the Defendant did preſcribe to pay the tenth ſhock of corn for all the corn, hay, and rakings of the corn: and in the end all the juſtices agreed, that by the civil law the tenth ridge is due for tithe-corn; therefore, for the reaping, binding, and ſhocking, it is a reaſonable preſcription, that the party ſhall have the hay on the head

1800.

KNIGHT v. HALSEY; in Error.

lands in recompenſe of the ſaid other things; and the hay upon the head lands is but of little value." Upon the whole, this caſe of *Stebbs* v. *Goodluck*, ſifted and commented upon as it has been by our text-writers, is, to my underſtanding, a very conſiderable authority to prove, not only that local cuſtom may regulate the mode of ſetting forth tithe, but alſo, that according to profeſſional tradition, tithe may be ſet forth while ſtanding, and before it is ſevered; though it is true, as was obſerved by Mr. *Attorney General*, that there is no adjudged caſe in which it is declared, that tithe may or may not be ſo ſet forth. The anſwer given to all theſe caſes is, that they reſpect articles which have been in uſe time out of memory, and which, therefore, may be the ſubject of a legal cuſtom. This anſwer is merely technical: for we all know, that in point of fact, the evidence of uſage ſeldom goes back ſo far as two centuries; but if it goes back for a conſiderable length of time, and the article which it reſpects has been of immemorial cultivation, a preſumption attaches, that the uſage has been immemorial. In the caſe of hops, no ſuch preſumption can attach, becauſe the hop is of modern cultivation. But it ſeems to me that Courts of law are at liberty to decide by analogy, in this as in other caſes which ariſe on new ſubjects: and if they obſerve that local uſage has been reſpected as to the mode of ſetting forth thoſe tithes which may be the ſubject of cuſtom, they may alſo reſpect it when they declare a new ſyſtem of law on a ſubject introduced within time of legal memory. This, I think, our predeceſſors have done on the ſubject of hops; they have ſaid that local uſage, if convenient, and of long continuance, ſhall be reſpected; and that where there has been no ſuch uſage, the tithe ſhall be ſet out by the meaſure, after picking.

It appears to me to be fallacious to ſtate the preſent queſtion to to be—Whether modern uſage can be ſet up againſt the eſtabliſhed law of *England?* If that were the queſtion, I ſhould anſwer without heſitation, that it could not; but I conſider the queſtion at preſent to be—Whether the Courts of law have not, when they firſt ſettled the general practice as to tithing hops, ſettled it with a due deference to particular local uſages: and whether they might not legally do ſo? They were aware that the uſage, though not immemorial, might be coeval with the cultivation of the article; that in particular places fit and convenient uſages might have prevailed: that the general rule declared by them was anomalous,

illegitimate,

illegitimate, and ſupportable upon principles of conſcience only; and, therefore, they would not ſet it up rigorouſly and ſtrictly, to diſturb the peace of pariſhes, and to deſtroy all eſtabliſhed uſage; but they laid down their rule ſubject to ſuch a reaſonable uſage as had obtained in particular places. Now if convenient uſage is firſt eſtabliſhed, and the law is ſettled afterwards upon a principle of convenience, why may not the courts ſettle the law ſubject to ſuch uſage? Are we to be told that the law is drawn from the eternal and immutable principles of reaſon and juſtice; and that, though it was ſettled as to ſome particular point only yeſterday, it muſt neceſſarily have relation back to the firſt conſtitution of things, and deſtroy every uſage to the contrary? This doctrine, rigidly purſued, would deſtroy all local cuſtom; for the cuſtom being in derogation of the law, ought then to have been aboliſhed when the law was ſettled. But the Courts have declared that both being beyond time of memory, cuſtom, if reaſonable, may ſtand againſt the common law, though it is in derogation of thoſe immutable principles on which the common law is founded. I ſee no reaſon why our Courts may not follow a ſimilar rule by analogy, and where they know, or have reaſon to believe, that convenient local uſages have prevailed for above a century before the law was ſettled; why they may not lay down this rule with a due regard to the preſervation of thoſe uſages. If they have done ſo, (and I think they have in the preſent inſtance,) I incline to ſupport the deciſions.

I do not hold myſelf bound to ſay, that my predeceſſors were in an error in 1687 and 1740, and that though morally right they were technically wrong, or to ſet pariſhes on a new courſe of tithing, and, for aught I know, on a new courſe of huſbandry as to picking their hops, when I have evidence before me that they have proceeded in a particular courſe peaceably and quietly for near two hundred years, under a ſanction of a decree of the Court of *Exchequer*. The rule of *Stare deciſis* is as juſtly applicable to private parties as it is to general principles, where the deciſion can be reaſonably aſcertained and ſupported. And on the preſent queſtion, I find no principle and no deciſion, ancient or modern, which calls on me to declare, that the decrees of 1687 and 1740 were againſt law.

My 3d propoſition is—That the uſage ſet up in this caſe may be ſupported without violating any legal principle. If the opinion is well founded, that the general law of ſetting forth the tithe of hops has been ſettled with the exception as to convenient and eſtabliſhed local uſages, and that it is no violation of legal principles to have ſettled it ſo; the only doubt on this propoſition will be, Whether there is any thing illegal in the uſage here ſpecially ſet up? Where the ſubject-matter is capable of cuſtom, and where uſage can be aſcertained, Courts of law have been even aſtute to ſupport it.

The caſe of *Scory* v. *Baber*, *P.* 34 *Eliz. Cro. Eliz.* 276. was a prohibition againſt the proprietor of the church of *South Kikrby*, who ſued for tithes of hay. It was ſurmiſed that time out of mind the owners of theſe lands had found ſtraw for the body of the church, in *diſcharge of all tithes of hay*; *Coke* moved that this is no diſcharge; for the parſon was not chargeable with it, nor had any benefit by it; and of that opinion was the whole Court: but if he had alleged that he gave the ſtraw to the parſon, and he beſtowed it in the body of the church, or that the *parſon had a ſeat in the body of the church*, it had been otherwiſe. In ſhort, any compenſation, however ſmall, may be ſufficient to ſupport a diſcharge from payment of *tithe in kind*; and the ſmaller the compenſation (if it is pecuniary) the greater is the probability of its antiquity. It was ſaid in the argument that there ſhould be ſome mutuality between the parties; ſome benefit to the one and ſome charge to the other: the compenſation need not be equal, but ſomething ſhould be given, *however ſmall.* This rule holds as to a modus in diſcharge of tithes in kind; but I do not find that it holds as to the *modus exponendi*. Tithes may, according to the authorities and caſes above referred to, be ſet forth according to the cuſtom of the country, without a particular compenſation for not ſetting them out according to the general rule of law. The uſage ſet up in the preſent caſe is ſtated at length in the bill of exceptions. Divers objections have been ſuggeſted to it at the bar: 1ſt, That it gives no recompence, not even the binds. I anſwer, 1ſt, That no recompence is neceſſary in a uſage merely as to the ſetting forth of tithe. 2d, That as the cuſtom is here ſtated, I think the binds left for the parſon to cut do paſs to him: the farmer does not ſtate that they were to be left for him; I think he may chooſe whether he will carry them away. And as to the binds being a recompenſe, it is well known that experiments have been lately made to turn them into a pulp which may make paper; though they have not yet ſucceeded.

The 2d objection is, That there is no ſeverance: I anſwer, that there is a ſeverance by the farmer of his ſhare, ſo as to aſcertain when the tithe is due; the ſeverance of the tithe in kind is merely for the benefit of the tithe-owner, and if he chooſes to renounce this benefit for his own convenience, he may lawfully do it.

The 3d objection is, That it will not give a complete tithe; for, ſuppoſe there ſhould be only nine hills, the parſon would be entitled to nothing. I anſwer, That I do not find the uſage ſo ſtated. I ſhould rather ſuppoſe, that if there were only nine hills, the uſage would not attach: but the ſuppoſition of only nine hills is rather a matter of fancy than a caſe likely to happen; and perhaps it may be fair to anſwer, that ſuch a ſmall circumſtance as this is beneath the regard of the law in a queſtion of parochial uſage. *De minimis non curat lex.*

The 4th objection is, That it is open to fraud; that the farmer may manure ſome hills better than others; that in ſetting out his tithe he may begin to reckon from ſome particular hill ſo as to throw all the unproductive hills into the parſon's tithe. I anſwer, 1ſt, That this is not like the caſe of the cuſtom condemned by *Wray* Ch. Juſ. where the farmer was neceſſarily to begin at a particular ground, and might conſequently neglect to manure every tenth ground, and know for a certainty that it would be the lot of the tithe-owner: here the farmer has no cuſtomary right to begin at a particular hill; he is to begin as in a corn or hay field, at ſuch hill or ſheaf, or hay-cock as may enable him to ſet forth the tithe fairly and equally; he muſt ſet it forth openly, ſo that it may be viewed and objected to by the tithe-owner or his agent; and if it be not fairly ſet forth, the tithe-owner has various remedies to enforce his right. But further, the ſuppoſition that the farmer can manure and prepare his hop-ground in ſuch a manner as to enable him to count the tenth hill or row ſo unfairly as to make all the blaſted or blighted, or unproductive parcels fall to the parſon's ſhare is much too refined, and is directly contrary to the facts ſtated in the bill of exceptions. "Many hills may be weak "and many die, *and it is impoſſible to foreſee which.*" The bill of exceptions alſo ſtates, that the tithe of hops may be fairly ſet out by the tenth hill, and that ſuch ſetting out is the moſt convenient mode, and leaſt liable to fraud. There is alſo the opinion of the Court of *Exchequer*, in 1687, that the cuſtom, uſage, and practice is reaſonable and fitting to be obſerved. Under theſe circumſtances I do not feel myſelf warranted to pronounce that

this

1800.

KNIGHT *v.* HALSEY; in Error.

this uſage, which had prevailed, and in which all parties had acquieſced for above ſixty years before 1687, and which has ſurely influenced all parties in the compoſitions they have made for above a century paſt, is in itſelf illegal, and could not be ſupported if it reſpected a ſubject of immemorial exiſtence. I do not preſume to impeach the wiſdom or policy of the general law laid down as to tithing hops. It is probably the moſt politic and convenient that could be adopted; and the preſent litigation ſhews that (in the opinion of the tithe-owner of this pariſh at leaſt) it is more profitable for the church than the uſage which the pariſhioners of *Farnham* now ſet up. But I think it is anomolous and founded on the principle of convenience and policy only: and I think too, that it is not wholly void of inconvenience, nor likely to be unproductive of diſputes, where there is no compoſition. For the farmer is not bound to provide meaſures or veſſels to hold the tithe after it is aſcertained; conſequently the tithe-owner muſt have agents attending in every ground, and in various parts of extenſive grounds, while the hops are picking, who muſt be ready to receive the tithe immediately as it is ſet forth. Such rights on each ſide may give riſe to great diſpute, where the tythe is taken in kind, and the parties cannot agree on a compoſition. The uſage here ſet up may have inconveniences alſo; but they are not of ſuch a nature as to ſatisfy me that the Court of *Exchequer* did wrong when in 1687 they declared the uſage to be reaſonable and fitting to be obſerved: the conveniences and inconveniences of the uſage may be thus ſtated: The loſs to the tithe-owner is—the benefit and expence of picking the tithe. On the other hand—he takes his own reaſonable time to pick; he ſaves the expence and difficulty of procuring a number of agents to attend in various places; he picks and ſorts as he pleaſes; he has the ſtalks if ever they ſhould prove valuable. The farmer too has ſome diſadvantage:—his ground may be incumbered; his hop-poles are uſed and expoſed for a reaſonable time beyond his own harveſt.

Upon the whole I am of opinion, That the law of tithing hops has been ſettled not generally, but with an exception as to reaſonable and ancient uſage reſpecting the mode of ſetting it forth; that the Courts might ſo ſettle the law, and allow ſuch exception, without violating any ſound principle of the law of *England*; and that this uſage, ſet up by the Plaintiff in error in the bill of exceptions, (if the jury had been of opinion that the facts there ſtated were ſufficiently proved,) is not contrary to any principle of tithe-law.

Some apology may not be improper for having occaſioned ſo much trouble to the Houſe and to the Judges, for thus differing in opinion from thoſe whoſe judgment I feel myſelf both diſpoſed and bound to reſpect. The beſt apology I can make is, to ſay, that as it is my opinion, I am bound by my oath to avow it, and by my duty to the public to ſtate the grounds on which I have formed it: and it is a great ſatisfaction to me to know that, if I am in an error, this Houſe will take care that my error ſhall work no injury to the parties nor to the eſtabliſhed law of the country.

The courſe of argument purſued by the learned judges who thought the direction right, was to the following effect:

The conſideration of this queſtion reſolves itſelf into three heads:—Firſt, What is the general rule of law with reſpect to ſetting out the tithe of hops, independant of particular uſage or practice in particular places? If that rule ſhould be found eſſentially to vary from the courſe which has been purſued in the pariſh of *Farnham*, and to which the Plaintiff has conformed: then, ſecondly, Whether the uſage ſtated in the bill of exceptions, however convenient and applicable to any modern improved method of cultivating and preparing the hop for market, can overturn the general rule, or be ſupported upon any legal principles? and, thirdly, Whether ſufficient matter was given in evidence, whereon to ground a ſound preſumption of a real compoſition having taken place with reſpect to this article of annual increaſe?

That this article became a ſubject of cultivation long poſterior to the time of legal memory is a fact noticed in a variety of caſes agitated more than a century ago. It ſeems true, indeed, that the Courts of juſtice were not called upon to declare the particular mode in which hops were titheable until a conſiderable time after their introduction into this country; though, when the point did ariſe, there appears to have been little difficulty in deciding it. All titheable matters, when newly introduced, are claſſed among others to which they bear an obvious reſemblance; and are accordingly deemed a great or a ſmall tithe, and are required to be ſevered and ſet out in a ſimilar manner with thoſe articles which they reſemble. Such has been the caſe with woad, ſaffron, tobacco, and other ſuch titheable matters; ſuch would have been the caſe with madder, had not the legiſlature eſtabliſhed a temporary compoſition, which expired in 1736; ſuch has alſo been the caſe with all artificial graſſes. The right of the parſon to his tithe in kind accrues on the act of ſeverance; his right to take the tithe accrues when the titheable matter, after ſeverance, is in the earlieſt ſtage of the courſe of huſbandry applicable to it, in which the tenth part may be viſibly diſtinguiſhed from the other nine. What ſhall be deemed a ſeverance muſt depend upon the nature of the matter to be ſevered. But no other mode of ſeverance in the caſe of titheable matters of annual increaſe has been judicially recognized, except that of ſeverance from the ſoil, and ſeverance from the parent ſtem. The ſame principle that requires fruit and ſeeds to be ſet out, after they are gathered or collected, by meaſure or weight, muſt require hops to be tithed in the ſame manner, after being picked or gathered from the plant. The flower of the hop is the ſole object of the cultivation of that plant, and it not only is, but neceſſarily muſt, to preſerve its quality and value, be picked and gathered upon the ſpot. It ſeems difficult to diſtinguiſh the caſe of hops, from peaſe plucked by the hand for the uſe of man, as the phraſe is, from the bind of the plant, or from beach maſt, and acorns pulled from the trees. Hops are, in truth, the fruit of the plant, as much as the pod of peaſe. Upon principle, therefore, the mode of ſevering and ſetting out the tithe of hops contended for by the Plaintiff in error is not that which the law requires. Although there was a time when it was doubtful what the common law principle of ſevering and ſetting out this tithe was, the point is now ſettled even in the laſt reſort. The firſt caſe is in 1 *Roll. Abr.* 644. tit. *Diſmes* (Y), *pl.* 3. 14 *Jac.* 1. where it is ſaid, "A man may ſet out his tithe of hops before they are dried." The ſtage of huſbandry immediately preceding the drying is the picking; conſequently, it was not then doubted, that they muſt be ſevered by picking before they are ſet out. In 1672, in the caſe of *Crouch* v. *Riſden*, 1 *Sid.* 443. *Twyſden* J. ſaid, that it was uncertain whether they ought to be tithed by the hill, the pole, or the buſhel. This proves nothing affirmatively on the ſubject, but only that he did not conſider the ſubject as having received any determination which aſcertained the general rule of law upon the point. About twenty years after this obſervation of *Twyſden*'s, the queſtion came under conſideration in the caſe of *Chitty* v. *Reeves*, *viz.* in the year 1687. The Court there pronounced the rule of the common law, by declaring, that in caſe there had not been ſuch uſage as was proved in that caſe, the tithe of hops ought to be paid in kind, which they explained to be the tenth part of the whole after picking. The expreſſion of paying it in kind, is ſomewhat ſingular, and moſt ſtrongly imports that any other mode would be a ſort of ſubſtitution for the tithe itſelf. In 1698, in the caſe of *Gee* v. *Perch*, the cuſtom alleged of paying ten ſhillings an acre, was declared by the Court to be a bad cuſtom; and in the abſence of any good cuſtom an account was decreed of a tenth part of the value of the hops, when the ſame were pulled from the bind or ſtem: and the true reaſon is there added, "at which time the tenth part is ſeverable from the nine parts, and the tithe by law payable." In a ſubſequent ſuit in 1794, by the adminiſtratrix of *Gee*, the Plaintiff in the former action, againſt the ſame Defendant, 1 *Wood*, 436. the ſame doctrine is laid down by the Court; and this caſe is the ſtronger to ſhew the neceſſity of picking the hops, becauſe the Defendant did not inſiſt on ſetting out the tithe by the tenth row or hill, but had cut down ten hills together, and ſet out the tenth of the whole quantity, both hop and bind, thereby giving the tithe-owner his full proportion. Again, in 1720, *Bliſs* v. *Chandler*, the Court declared that hops are not titheable until they are picked; and that the tithe thereof ought to be paid in kind by the buſhel, namely, every tenth buſhel of the whole, after picking. The ſame rule prevailed in the two ſeveral caſes of *Sneed* v. *Unwin*, in 1740 and 1752. Laſtly, in *Walton* v. *Tyers*, decided in the Houſe of Lords, in 1753, 5 *Brown, Parl. Caſ.* 99. where the Defendant inſiſted on ſetting out every tenth hill, and cutting the bind; and on the other hand the Plaintiff demanded every tenth buſhel, when picked; it was declared, that the mode inſiſted on by the Defendant was improper; and further, it was affirmatively pronounced, that the tithe ought to be ſet out after the hops are picked from the bind or ſtem. From this ſeries of authorities, which is not impeached by any thing to be found in the books, or by any thing to be drawn from the nature of the caſe, it ſeems completely ſettled, that the ſeverance of the tithe of hops muſt be by ſeparating the fruit from the ſtem.

Seeing then what is the general rule as to ſevering the hops and ſetting out the tithe thereof, we may proceed to inquire, Whether any ſuch uſage as that which has been ſet up by the Plaintiff in error can be ſupported conſiſtently with the rules of law? The uſage ſtated in the bill of exceptions amounts to this, that the occupier ſhall, at his diſcretion, leave for the rector the tenth part of the hops, not ſevered, as we have ſeen that the common law principle requires; but in a ſtage of the huſbandry of this article,

1800.

Knight v. Halsey; in Error.

ſhort of that in which he is entitled by law to receive it, and that without compenſation. This is preciſely the ſame thing in principle as if it were contended that the rector, by cuſtom, ſhould receive a leſs quantity in that ſtage of huſbandry, when it is by law to be ſet out, than he is entitled to; for, abridging the quantity of the tithe, and calling upon the rector to incur expence, when he is not by law obliged ſo to do, come to the ſame end, ſince both equally reduce his profit. The queſtion then is, Whether the uſage contended for be good and available in law? Now there are three diſtinct things, beſides the rules and principles of the common law, that control the right of tithes; *viz.* cuſtom, modus and real compoſition. Theſe three reſt on different foundations, the confounding of which has introduced much of the perplexity and difficulty which have ariſen in this cauſe. Cuſtom, in reſpect of prædial tithes, chiefly regards the manner of ſetting them out. It muſt be immemorial; it requires no equivalent; it is to be preſumed coeval with the original payment of tithes, or endowment of the pariſh church, provided it be not ſubject to fraud; for it never can be preſumed that the Lord of the Manor, at the time of endowing the pariſh, meant to ſtipulate for ſuch a mode of ſetting out the tithes as would defeat his own endowment. Hence come the different modes of tithing the ſame article in different pariſhes. In ſome places the modes of huſbandry, in others, the fervor and zeal of Chriſtians in the early ages, gave an advantage to the parſon. When the Lords of Manors conſecrated their tithes to any church, as they might have done before the ſecond council of *Lateran*, probably they expreſſed, in the conſecration, in what manner the tithe ſhould be paid. *Cujus eſt dare, ejus eſt diſponere.* See *Selden's Hiſtory of Tythes.* The payment of tithes was at firſt voluntary, and of imperfect obligation. Afterwards, indeed, it was enforced by papal bulls, and by decrees of councils: but the canoniſts in all ages admitted that the cuſtom of tithing was to be obſerved in every pariſh. *Linwood's Provinciale De Decimis* (a). Modus and real compoſition differ from each other in nothing more than in their origin. Modus muſt have exiſted from time immemorial; compoſition real muſt have been made before the diſabling ſtatute of the 13 *Eliz.* But both modus and real compoſition muſt be ſubſequent to the original endowment of the church, inaſmuch as they control it, and are founded on the conſent of the parſon, patron, and ordinary. Now the uſage of tithing hops inſiſted on by the Plaintiff in error, cannot be referred either to a cuſtom, or to a *modus*, becauſe the cultivation of hops was introduced within the time of legal memory. Whether the plant be indigenous or not, we are informed by many caſes which occurred at a great diſtance of time from the preſent day, that its cultivation for uſe is modern; and, indeed, the evidence in the preſent caſe ſtates, that in the pariſh of *Farnham*, and elſewhere in the kingdom, hops are "with reference to time of legal memory, modern and within time of memory;" and it was almoſt conceded at the bar, that as a cuſtom which muſt be immemorial, reaſonable, and certain, the uſage contended for could not be ſupported, although it appears to have obtained a conſiderable time prior to the laſt hundred years, during which the pariſh has been under compoſition. In *Crouch* v. *Riſden*, 1 *Sid.* 443. the Court refuſed to grant a prohibition upon the ſuggeſtion of a *modus* for hops, declaring that they would take judicial notice that hops were not of ſufficient antiquity to become the particular ſubject of a *modus*, though hops, as well as other matters of novel introduction, might be included in a *modus* for ſmall tithes in general. This caſe aroſe a conſiderable time before that of *Chitty* v. *Reeve*, which was decided in 1687; and after the caſe of *Chitty* v. *Reeve*, the ſame point was again determined in 1698; for in the caſe of *Gee* v. *Perch*, the defendant having ſet up a *modus* of 10*s.* an acre for hops, the Court declared the cuſtom void in law; and, according to a ſhort report of the ſame caſe, from a manuſcript of Ld. Ch. B. *Dodd*, in *Rayner* on *Tithes*, p. 87. the ſecond reſolution is, "that no *modus* can be for hops, *being a late thing*." So Lord Ch. B. *Comyns*, in his judgment, in *Wallis* v. *Payne*, *Com.* 638. conſiders it as ſettled, that hemp, line, ſaffron, hops, and tobacco, are new things, and as ſuch to be ranked with matters of a like nature, as ſmall tithes. But it was contended, that the mode of ſetting out the tithe of a matter newly introduced with a reference to the time of legal memory, and which mode was poſſibly cöeval with the introduction itſelf, might be good, as being reaſonable, and that this was actually ſo by uſage in other caſes. To this it may be anſwered, that a cuſtom of tithing, like every other cuſtom, muſt be conformable to what is required by the common law; and that reaſonableneſs or fitneſs will not alone diſpenſe with other ingredients which neceſſarily enter into the definition of a cuſtom. It

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(a) Fo. 196.

1800.
Knight
v.
Halsey; in Error.

would be repugnant to every principle of law, to hold that an obligation created by the general law of the land could be avoided within particular limits, by the immediate effect of a contrary practice of ſixty or ſeventy years in that diſtrict; or, according to the argument at the bar, that there ſhall be a rule of law which is only to take place when there has been no practice to the contrary. Immemorial, reaſonable uſage may, indeed, locally ſuperſede the common law, and introduce a different rule; but the common law cannot be different at *Farnham* from what it is in *Kent* or in *Eſſex*, or in other places. It muſt be the ſame in all places, otherwiſe there is no rule of the common law at all.

In ſupport of the uſage ſtated in the bill of exceptions, the caſe of *Chitty* v. *Reeve* was cited; the proceedings and decree in which cauſe are to be found in 1 *Wood*, 251. This caſe deſerves particular examination. It aroſe in this very pariſh of *Farnham*; the opinion of the Court was given upon nearly the ſame ſtatement of the practice of ſixty years before the ſtatute of *Jac.* 2. that is to be found in this bill of exceptions; and if that opinion were well founded in point of law, it would diſpoſe of the queſtion in the plaintiff's favour. A bill was filed by the adminiſtratrix of the leſſee of the tithes, for an account of the tithe of hops, ſuggeſting that the cuſtom in *Farnham* was to ſet them out in the manner contended for by the preſent Plaintiff. The Defendant, the occupier, admitted that they ought to be ſet out by the tenth hill, but inſiſted that the growth of every tenth hill ought to be left upon the hill with the binds cut, and ſtripped from the pole, to be taken away by the tithe-owner to be picked elſewhere. Upon the evidence given in the cauſe it appeared to the Court, that the practice inſiſted upon by the Defendant would, for the reaſons given, be deſtructive to the tithe; but that to ſet out the tenth row, where the rows were equal, and when not, the tenth hill, and to leave it ſtanding, with the binds uncut, for the tithe, and for the impropriator to have a convenient time to come and cut the bind and pick the hops upon the ground, had been obſerved for above ſixty years. This cuſtom, uſage, and practice, the Court declared to be reaſonable and fitting to be obſerved; at the ſame time pronouncing the common law obligation, of ſetting out the tithes in kind, to be as before mentioned. One is at no loſs to find out the reaſon why the defence was overruled; but it is not ſo eaſy to diſcover the ground upon which the Court could declare, that the cuſtom, uſage, and practice, alleged by the Plaintiff, was reaſonable

able and fitting to be obſerved; at leaſt, if by that language they meant to ſay, (as ſeems to have been the caſe, though the decree is only for an account,) that it was obligatory upon the tithe-owner, though it was contrary to the general rule of law which they themſelves in the ſame breath declared. How they applied this cuſtom, uſage, and practice, as they call it, the decree gives us no information. They may have decided upon the effect of an uſage of ſixty years *proprio vigore*, and independent of the conſideration how far it might be evidence of ſomething further; they may have conſidered it as evidence of a legal, immemorial cuſtom; or they may have conſidered it as evidence of a compoſition real. At any rate, the attention of the Court was not drawn to the general point, Whether either of the cuſtoms, ſet up by the parties, could have any foundation in law? The antiquity of either cuſtom did not come in queſtion, but only their comparative reaſonableneſs, and on that alone the Court determined. The authority of that caſe, therefore, does not weigh much in the preſent, where the point as to the validity of any cuſtom upon this ſubject is directly made. The other caſe mainly relied upon to ſhew, that a practice of long ſtanding, although not properly a cuſtom, may be conſidered as having the ſame effect, in the caſe of hops, is that of *Sneyd* v. *Unwin*, in 1740. There the Plaintiff inſiſted that the tithe ſhould be ſet out in the manner now contended for by the Defendant in error. The Defendant relied on an ancient uſage of tithing by the tenth pole or hill, after the binds are ſevered from the ground. The Court directed an iſſue, to try "Whether the uſage was for hops to be tithed before they are picked from the ſtalk?" From this, it has been contended, that the Court muſt have been of opinion that ſuch an uſage might be good: but it is much too ſtrong a concluſion to ſuppoſe a Court of Equity pledged to any ſettled opinion on a matter which, by directing an iſſue, it confeſſes may be more effectually inveſtigated at law both as to the legal principles applicable to the uſage proved, and as to the fact of uſage itſelf. That a Court of Equity ſhould pauſe, and call for information upon thoſe heads for its own ſatisfaction, before it proceeds to a decree, cannot, in fair reaſoning, furniſh ſuch an inference; and perhaps the Court might be leſs ſcrupulous, having the decree of *Chitty* v. *Reeve* before them, where their predeceſſors had been governed by an uſage. In *Sneyd* v. *Unwin* the verdict was againſt the cuſtom. Whether that aroſe from the party upon whom the affirmative lay

failing

1800.

Knight v. Halsey; in Error.

failing in his proof of the uſage having long ſubſiſted, or from the direction of the judge upon the effect of the uſage ſuppoſing it proved to be of long ſtanding, we have no means of knowing with certainty; but it is reaſonable to ſuppoſe that the ſame uſage would not have been ſet up twelve years afterwards, namely, in 1752, unleſs ſtrong evidence had been given of it in the firſt cauſe; and the declaration of the Court in the ſecond cauſe ſeems to countenance an opinion, that the invalidity of the uſage in point of law might have been the ground of determination, ſince the Court declared that the method inſiſted on "was not the legal method of tithing hops, but that they ought to be picked or gathered before the ſame are titheable," and decreed an account accordingly. The only juſt inference which can be drawn from that caſe is, that the Court of Equity did not think proper, any more than another Court of Equity in the preſent caſe, to determine upon a matter of cuſtom, without the aſſiſtance of an inveſtigation of the facts *vivâ voce*, and of the law which ſhould reſult therefrom.

The uſage inſiſted on by the Plaintiff in error appears alſo to be defective in reaſonableneſs; for it is ſtated in the bill of exceptions, that the occupier is to leave the tenth row if equally planted, or the tenth hill if unequally planted. This mode of tithing, therefore, is more open to fraud than that preſcribed by the common law, ſince the planter has it in his power to determine which ſhall be the tenth row or hill, and accommodate his cultivation accordingly, and as many hills are weak and many die, and he can begin to ſet out from what part he pleaſes, it would require very little contrivance ſo to ſet them out, that the hills allotted to the parſon ſhould be thoſe which are weak and blighted. This is not merely an opening but an invitation to fraud. Authorities however have been reſorted to, to ſhew that ſuch a mode of ſetting out tithes has been conſidered as reaſonable, and may be good by cuſtom; and for this purpoſe the caſe of *Stebbs* v. *Goodluck*, *Moor*, 913. 1 *Leon*, 99. has been relied on. According to the report in *Moor*, the parſon, as he alleged, was to have every tenth land for tithe of corn, beginning with the land next the church; and the occupiers knowing which of the lands would be the parſon's, neglected to till, ſow, and manure them as they did their own; for which fraud, the parſon ſued for tithe in kind, that is, every tenth ſheaf, in the Spiritual Court: but the Court of *King's Bench* granted a prohibition, becauſe the parſon's remedy for the fraud was at common law. According to this report, it does not appear that the validity of the cuſtom was at all taken into conſideration, but only that the parſon having ſued in the Spiritual Court, and having ſtated a fraud as the only ground on which his ſuit there was founded, was told that his remedy was at common law, and therefore a prohibition was granted. But in the report of the ſame caſe, in *Leonard*, the reporter ſtates that the opinion of *Wray* Ch. J. was, that the cuſtom was againſt common reaſon, and void; but that if it were a good cuſtom, then that the parſon ſhould have his action on the caſe at common law. Nothing more ſeems fairly to be collected from the two reports, than that the Court decided, that at all events the fact of fraud ſhould not be tried in the Spiritual Court, the Chief Juſtice expreſſing his opinion as to the cuſtom, from which no one is ſtated to have diſſented. The *dictum* of Lord *Hobart* in *Hyde* v. *Ellis*, *Hob.* 250. is the only other authority cited to the ſame effect. The point immediately in judgment in that caſe was, Whether carrying the firſt crop of hay into the advanced ſtate of tedding, and putting it into windrows, might be a compenſation for exempting the ſecond crop from payment of tithe? and it was determined, as it has often been ſince, that it might. By way of aſſimilation to the caſe then at bar, the report ſtates his Lordſhip to have ſaid, that at divers places they ſet out the tenth acre of wood ſtanding, and ſo of graſs. It muſt be obſerved, that the law of tithes was not ſo well aſcertained in the time of Lord *Hobart* as it is at preſent, and many opinions then fluctuated upon matters which have ſince been ſettled. With reſpect to wood, indeed, if it were titheable only by cuſtom, as it was at that time ſuppoſed to be, the tithe-owner could only have taken it in the way that cuſtom gave it to him. But the propoſition as applied to graſs, or any ſubject titheable by the general law, is not warranted by any deciſions ancient or modern, but is contrary to the courſe of them all. There muſt in all caſes, and without any exception, be a ſeverance from the freehold, ſo that what was part of the inheritance may become a chattel and veſted in the parſon. If this were not the caſe, the Spiritual Court would be ouſted of its juriſdiction, for it can hold no plea of what relates to the freehold. In all the books, indeed, tithes are called lay chattels; but till ſevered they are not ſo; they ſtill remain parcel of the freehold, ſo that ſeverance is eſſentially neceſſary. That a particular piece of wood-land, or meadow-land, ſeparately and immemorially enjoyed by the parſon, may be a com-

1800.

Knight v. Halsey; in Error.

a compenſation for tithe of wood and hay, is undoubted; but no authority except the *dictum* above mentioned is to be found, to ſhew that the leaving a tenth of any titheable matter unſevered can be good by cuſtom. The caſe of *Stedman* v. *Lye*, *M.* 11 *W.* 3. 1 *Lord Raym.* 504. is ſtrongly in point. In a ſuit for tithe of hops a *modus* was ſet up, that if the parſon ſend his ſervant, &c. to pull *aliquam partem lupulorum*, he ſhould have the tithe of them, &c. But it was agreed by the Court to be "an ill cuſtom, becauſe it drives the parſon to more pains than the law requires to entitle him to that which by law he ought to have in the ſame manner without ſuch pains."

The obſervation of Mr. Juſtice *Twiſden*, in *Crouch* v. *Riſden*, ſeems to have a contrary tendency to that which was contended for by the Plaintiff in error. When he obſerves that the legal manner of ſetting out the tithe of hops, whether by the hill, the pole, or the buſhel, had not been ſettled; he muſt be underſtood to ſay, that in point of fact the tithe had been ſet out in theſe ſeveral ways in different pariſhes, but which of them was the legal way had not been then determined. Had he conceived that the practice which had long obtained in each particular pariſh, could conſtitute the legal mode in ſuch pariſhes reſpectively, it is probable that he would have ſo ſaid; but it ſeems plain that he conceived ſome general rule, founded on principle and applicable to all places, remained to be aſcertained: that general rule has ſince been aſcertained in the caſe of *Walton* v. *Tyers*.

The ground, however, upon which the Plaintiff in error principally relied, was that of a real compoſition, which it was argued might have taken place antecedent to the 13 *Eliz.*; but it is very doubtful whether the manner in which, or the time when, the tithe itſelf ſhall be ſet out in kind, can be the ſubject matter of a real compoſition but only of the diſcharge of tithe.

In the *Codex* (*a*) it is ſaid, that a compoſition real is, "where the incumbent together with the patron and ordinary make agreement by deed executed under their hands and ſeals that certain lands ſhall be diſcharged from the payment of tithes in ſpecie in conſideration of a recompence to the incumbent either in money or in lands to him and his ſucceſſors for ever or in ſome other thing for their benefit and advantage." So Sir *Simon*

(*a*) *Gibſon's Codex*, tit. 30. c. 5. p. 705. *in notis*, ed. 1713.

KNIGHT *v.* HALSEY, in Error.

Degge obſerves: "That which we call a real compoſition is, where the preſent incumbent of any church, together with the patron and ordinary, do agree under their hands and ſeals, or by fine in the King's Court, that ſuch lands ſhall be freed and diſcharged of payment of all manner of tithe for ever, paying ſome annual payment, or doing ſome other thing, to the eaſe, profit, and advantage of the parſon or vicar to whom the tithes did belong (*a*)." Indeed there are two requiſites to conſtitute a real compoſition, namely, that the tithe ſhall be diſcharged, and that a compenſation ſhall be given. Are theſe requiſites to be found in this uſage? That the tithes are not diſcharged muſt be admitted. Where then is the compenſation? It was ſaid that the parſon was to have the binds; but the pleadings do not give them to the parſon, and if they did, they are of no worth or value. It is obvious that in this caſe the parſon is to give up the benefit of having the hops picked for him, and to do it for himſelf at a great expence, and in an inconvenient manner. For this he receives nothing: for according to the evidence, he is only to have the privilege of coming upon the land, of cutting the binds and picking the hops, and then carrying away the hops when picked. To this agreement, it was argued, the parſon might have been induced to accede in order to tempt the occupiers of lands to plant hops, and ſo give encouragement to a very expenſive cultivation. As to the inducement, if this were to be admitted as a compenſation, it would equally well eſtabliſh a cuſtom of tithing corn by ſetting out the tenth land, or apples, by ſetting out the tenth tree; becauſe, by a parity of reaſoning, it might be preſumed that the parſon held out this favourable mode of tithing ſuch articles in order to tempt the farmers and occupiers of lands to employ their wood-lands or paſture in ſuch culture as might produce more beneficial tithe to himſelf. In ſhort, it would make good a compoſition or *modus* to receive one fifteenth inſtead of one tenth of corn; for undoubtedly in all caſes, the leſs that is taken for the tithe of any article, the more the occupier is encouraged to cultivate that article; and if this alone were to be admitted as a ſufficient conſideration, the objection of want of conſideration would not lie in any caſe.

If therefore, on the preſumption that the tithe had been originally ſo granted, or on any other ſuppoſition this method of

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(*a*) The Parſon's Counſellor, Part 2. c. 20.

ſetting out the tithe of hops might, by immemorial uſage, be ſupported, ſtill the argument will not apply to the preſent caſe, wherein no immemorial uſage can have exiſted; and if the tithe-owner at the firſt introduction of hops had a right to his tithe by meaſure, the objection remains unanſwered, that the compoſition cannot be good, becauſe he parts with that right without receiving any compenſation.

Suppoſing, however, that this can be the ſubject matter of a real compoſition, it will be right to examine the nature of the evidence upon which the compoſition is attempted to be ſupported. In fact, the evidence is not applicable to a compoſition real. It conſiſts wholly of uſage, and is that ſort of evidence which is applicable to a *modus*, but has no reference to a particular deed of compoſition. Uſage is in general a ground for preſuming deeds, even againſt the crown: yet in the particular inſtance of compoſition for tithes, it is ſettled that where the deed cannot be produced, ſome evidence muſt be given referring to the deed, or ſhewing that it did exiſt, independent of mere uſage. And the reaſon why this has been ſo held, is ſtated to be, that if it were otherwiſe the church would be defrauded, and every bad *modus* turned into a good compoſition. *Heathcote* v. *Mainwaring*, 3 *Bro. Chan. Caſ.* 217. Indeed it may be collected from the Year Book 34 *H.* 6. 36. that the ancient law was, that an annuity founded on a real compoſition, in diſcharge of tithes, could only be claimed by producing the deed of compoſition, or by alleging an immemorial preſcription. The preſuming a deed from long uſage is certainly a novel invention of the judges for the furtherance of juſtice and the ſake of peace, where there has been a long exerciſe of an adverſe right. For inſtance, it cannot be ſuppoſed that any man would ſuffer his neighbour to obſtruct the light of his windows, and render his houſe uncomfortable, or to uſe a way with carts and carriages over his meadows for twenty years reſpectively, unleſs ſome agreement had been made between the parties to that effect, of which the uſage is evidence. But with reſpect to a compenſation for tithes the ſame reaſon does not obtain, becauſe temporary agreements are made and continued for the convenience of parties during a ſucceſſion of incumbents. There is no exerciſe of an adverſe right, which is generally deemed neceſſary to raiſe the preſumption. The beſt evidence of an agreement for a real compoſition having actually taken place is the deed itſelf, but that can rarely be expected. In the caſe of *Sawbridge* v. *Benton*, *Anſtr.* 375. inſtruments were given in evidence which ſtrongly denoted that ſuch an agreement muſt have taken place as they related, with a reaſonable degree of probability, more particularly to ſuch a tranſaction than to any other; wherefore the real compoſition was ſupported. Indeed, it appears to have been invariably holden that ſome evidence muſt be adduced to ſhew that ſuch an agreement, though loſt, did once exiſt. Such was the opinion of the Court of *Exchequer* in the caſes of *Robinſon* v. *Appleton*, 4 *Wood*, 10.; and *Hawes* v. *Swaine*, 4 *Wood*, 313.; and ſuch was the opinion of Lord *Hardwicke* in *Rotherham* v. *Fanſhawe*, 3 *Atk.* 628. In the preſent caſe there is wanting that which is indiſpenſably neceſſary where a real compoſition is to be preſumed, namely, mutual loſs and gain on the reſpective parts of the parſon and occupier. Where the occupier has long retained that which by law he ought not to retain, and yields to the parſon that which by law he is not bound to yield; this mutuality of loſs and gain acquieſced in for a great length of time, is ſtrong corroborating evidence of ſuch an agreement having been executed by the neceſſary parties: but where this mutuality is not to be found, the preſumption muſt be that no agreement took place, whereby the parſon conſented, with the permiſſion of the patron and ordinary, to forego his legal rights without any retribution. The bare fact, therefore, of the parſon having been in the perception of leſs than what is due to him, or of that whichis due in a leſs beneficial manner, is not of itſelf a ground for preſuming a real compoſition: and this was the opinion of *Rolle*, as appears in the caſe of the Earl of *Hertford* v. *Leech*, 8 *Car.* 1. (*a*) where in ſtating what he conceives were the reaſons of the Court for holding that certain lands were not diſcharged of tithes, he gives this as one, "that it ſhall not be intended that any real compoſition or conſideration was given for the diſcharge of tithe without ſhewing that ſpecially." Such has been conſidered to be the law ever ſince.

From this courſe of reaſoning it follows that the tithe of hops, by the principles of the common law, is payable from the true time of the ſeverance of this titheable matter, namely, from the picking; that no cuſtom or *modus* can apply to this any more than to many articles of modern introduction; that no long prac-

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(*a*) Vid. 2 *Danv. Ab.* 612. tit. *Diſmes* (I.), pl. 2. *Vin. Abr.* tit. *Diſmes* (I. a), pl. 2.

1800.

KNIGHT *v.* HALSEY; in Error.

tice, even though concomitant with the introduction of the article itſelf, can have the effect of a cuſtom or *modus*, and vary the legal principle by which the tithe is to be ſet out; that as a real compoſition, the mode of tithing contended for cannot be ſupported, ſince it does not fall within its definition; that if it did, there is in this caſe no evidence whatever of the exiſtence of a deed of compoſition; that the uſage contended for would fnruiſh to the farmer a temptation almoſt irreſiſtible to cheat the parſon, and would ſubject the property of the church to imminent peril, and therefore that upon the matter ſet out in the bill of exceptions, the direction was rightly given to the jury to find for the Defendant.

After hearing the opinion of the Judges, the Houſe, upon the motion of the Lord Chancellor, reſolved that the judgment of the Court of *King's Bench* ſhould be affirmed.

Mr. *J. Buller* was prevented by illneſs from attending in Court during any part of this term, and early in the enſuing vacation died at his houſe in *Bedford-Square*.

THE END OF EASTER TERM.

ERRATA.

Page 73. line 38. in marg. for " *B.*" read *A.*

137. — 11. from bottom, for " as it ſerved," read *as it was ſerved*

155. — 3. note (*a*), after " inſurance," inſert *or goods.*

176. — note (*d*), for " *Brown P. C.*" read 5 *Brown P. C.*

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CASES

ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER,

AND

In the HOUSE OF LORDS;

IN

Trinity Term,

In the Fortieth Year of the Reign of GEORGE III.

(The following caſe was decided in laſt Eaſter Term, but its publication was unavoidably delayed till the preſent period.)

LONG *v.* DUFF.
Idem *v.* BOLTON.

May 26th.

THESE were two actions on policies of inſurance on the ſhip *Lucy*, at and from *Padſtow* in *Cornwall* to *Leghorn.*

The cauſes were tried before Lord ELDON, Ch. J. at the *Guildhall* ſittings after *Michaelmas* term 1799, and verdicts were found for the Plaintiffs in both actions, under the following circumſtances: The *Lucy* was a *Spaniſh* built ſhip purchaſed at *Hamburgh* by the Plaintiff, a *Britiſh* ſubject; ſhe was not regiſtered, but had paid the alien duties. Previous to ſetting ſail upon the voyage inſured, the captain of the *Lucy* applied to the Admiralty for a licence to

A foreign built ſhip, Britiſh owned, is not required to be regiſtered: and may therefore ſail without convoy, being within the exception of the convoy act 38 Geo. 3. c. 76. ſ. 6. If a policy of inſurance be effected on ſuch a ſhip, it is not incumbent on the aſſured to communicate to the underwriter, at the time of making the policy, the circumſtance of her being foreign built.

proceed without convoy to *Leghorn* and *Naples*, but only obtained a licence for *Naples*; notwithſtanding which he proceeded on the voyage to *Leghorn* without convoy, and was captured off that place by a *French* privateer. The only difference between the two caſes was, that in the former it was repreſented to the underwriters at the time of effecting the policy that the *Lucy* was a foreign built ſhip and not regiſtered; but in the latter it was not.

On the part of the Defendant it was objected in both actions, that as the licence obtained did not extend to the voyage inſured, the *Lucy*, though a foreign built ſhip *Britiſh* owned, was within the proviſions of the 38 *Geo.* 3. *c.* 76. which makes void all policies upon ſhips ſailing without convoy; and in the ſecond, that ſuppoſing her not to be within the proviſions of the convoy act, that circumſtance ought to have been communicated to the underwriters.

On theſe grounds a rule *niſi* was obtained in *Hilary* term, calling on the Plaintiffs to ſhew cauſe why new trials ſhould not be had, and nonſuits be entered; and the caſes were afterwards argued by *Shepherd* and *Williams*, Serjts. for the Plaintiffs, and *Lens* and *Bayley*, Serjts. for the Defendants.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ELDON, Ch. J. There was nothing to diſtinguiſh the caſe of *Long* v. *Duff* from *Long* v. *Bolton*, except this ſingle circumſtance, *viz.* that in the latter it was not diſcloſed to the underwriters that the ſhip in queſtion was of ſuch a peculiar deſcription, as not to fall within the proviſions of the convoy act. With reſpect to which, we are all of opinion that it was properly left to the Jury to determine whether according to uſage it was the duty of the aſſured to give this information, or of the underwriter to ſatisfy himſelf upon that point. The Jury have decided that it was the buſineſs of the underwriter to obtain this information for himſelf.

With reſpect to the general point, the queſtion is, Whether a veſſel in the ſituation of the *Lucy*, departing without convoy, (not having obtained a proper licence ſo to do,) can be deemed to be protected by the policy? or, Whether that policy is not altogether void under the proviſions of the 38 *Geo.* 3. *c.* 76. *ſ.* 4. which declares that every policy of inſurance on any ſhip or cargo within the purview of the act which ſhall depart without convoy, or ſhall wilfully deſert its convoy, ſhall be null and void? The preamble of that act ſtates generally, "that it will add to the ſecurity of trade to prevent ſhips ſailing without convoy, except in certain caſes;" and the firſt ſection enacts, "that it ſhall not be lawful for any ſhip or veſſel belonging to any of his majeſty's ſubjects, except as hereinafter provided, to ſail or depart from any port or place whatever, unleſs under the convoy or protection of ſuch ſhip or ſhips, veſſel or veſſels, as ſhall or may be appointed for that purpoſe." The principle of policy ſtated in the preamble to this act will undoubtedly apply to ſhips foreign built in the poſſeſſion of *Britiſh* owners, as well as to ſhips *Britiſh* built. But whether it was intended to be carried to that extent is the queſtion we are now to decide, and which we muſt decide by examining the clauſe which is to carry the principle into effect. The ſixth ſection provides, that nothing in the act contained by which ſhips are required not to depart without convoy, ſhall extend "to any ſhip or veſſel which is *not required to be regiſtered* by any act or acts of parliament in force on or immediately before the paſſing of this act." It was contended on the part of the underwriters, that the words "not *required* to be regiſtered," might be conſtrued "not *entitled* to be regiſtered." But it is clear from the context, that the legiſlature intended to uſe the words "not required" in another ſenſe; for in the line immediately preceding, which deſcribes the prohibitions of the act, the words are "*required* not to ſail without convoy." The true queſtion is, Whether this ſhip was required to be regiſtered by any ſtatute in force when the convoy act paſſed? It appears that ſhe is foreign built, that ſhe was purchaſed previous to the time when the prohibition took place; and in order to aſcertain whether this ſhip being *Britiſh* owned is required to be regiſtered, or not, we muſt look back to the proviſions of our navigation laws. If, indeed, this ſhip be required to be regiſtered, having departed from a *Britiſh* port without having procured herſelf to be regiſtered, ſhe is for that offence, by 26 *Geo.* 3. *c.* 60. *ſ.* 32, *ipſo facto* forfeited. We therefore muſt be thoroughly ſatisfied, that we ſtand on the moſt ſolid grounds before we hold this ſhip ſubject to a regulation, by the having infringed which, if ſhe be indeed ſubject to it, ſhe has incurred the penalty of forfeiture. I ſhall not dwell upon any of the acts relative to navigation which were paſſed previous to the 12 *Car.* 2. But it may be obſerved in general, that it appears clearly from the uniform tenor of all the early acts upon the ſubject, whether paſſed during the time of the commonwealth (*a*), or ſubſequent to the reſtoration, that the policy of the legiſlature ever was to confine the privileges of our trade, as far as was conſiſtent with the extent of that trade, to *Britiſh* built ſhipping. But as the quantity of *Britiſh* built

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(*a*) See *Scobell's Acts*, Anno 1651, c. 22.

built ſhipping, at the ſeveral periods when thoſe acts were paſſed, was not adequate to carry on the whole trade of the country, it became the ſecondary object of the legiſlature to confer privileges on foreign built ſhips in *Britiſh* ownerſhip. In proportion, however, as *Britiſh* built ſhipping increaſed, the privileges conferred on foreign built ſhips in *Britiſh* ownerſhip were from time to time reſtricted. On the head of regiſtry I have not found anything worth ſtating, until the paſſing of the 12 *Car.* 2. *c.* 18. The firſt ſection of that act "for the increaſe of ſhipping, and encouragement of the navigation of this nation, wherein under the good providence and protection of God, the wealth, ſafety, and ſtrength of this kingdom is ſo much concerned," enacts, "that no goods whatſoever ſhall be imported into, or exported out of any of the lands, iſlands, plantations, or territories in his Majeſty's poſſeſſion in *Aſia*, *Africa*, or *America*, in any other ſhips but ſuch as do truly and without fraud *belong* only to the people of *England* or *Ireland*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, or are of the built of and belonging to any the ſaid lands, iſlands, plantations, or territories, as the proprietors and right owners thereof." This clauſe does not relate to the European trade, but only to the trade with the *Britiſh* ſettlements in *Aſia*, *Africa* and *America*. The effect of it is to give the privileges of that trade to all ſhips whatever owned by the people of *England*, *Ireland*, and *Wales*; but in the caſe of ſhips owned by the people of any *Britiſh* ſettlements, it alſo requires that ſuch ſhips ſhould be of the built of thoſe ſettlements. The third ſection which relates to the importation of goods from the ſettlements into *England*, *Ireland*, and *Wales*, confines that privilege ſolely to ſhips in the ownerſhip of thoſe countries. The eighth ſection prohibits the importation of goods from *Ruſſia* into *England*, *&c.* except in ſhips owned by the people of *England*, *&c.* and alſo prohibits the importation of goods of the growth of *Turkey*, except in ſhips *Engliſh* built; unleſs in ſhips of the built of the place from whence the commodities come, or of the port from whence they are moſt uſually ſhipped for tranſportation. The tenth ſection then eſtabliſhes a ſpecies of regiſter; "and for prevention of all frauds which may be uſed in colouring or buying foreign ſhips," it enacts that no foreign built ſhip ſhall be deemed an *Engliſh* owned ſhip, or enjoy the privilege thereof, until ſuch time as the owner ſhall have made the ſame appear by oath to the chief officer of the cuſtoms of the port where the ſhip is, which officer is thereupon directed to give a certificate of her being *Engliſh* owned, and to keep a regiſter of all ſuch certificates as he ſhall give, and make a return thereof to the chief officers of the cuſtoms in *London*. Taking the whole of this act together, it appears to deſcribe what are *Engliſh* built ſhips, and what are *Engliſh* owned ſhips; and in what caſes a foreign built ſhip *Engliſh* owned ſhall have the privileges of an *Engliſh* ſhip: but there is nothing which requires any foreign ſhips to be regiſtered. The reſult of the act is, that a foreign built ſhip, though *Engliſh* owned, unleſs regiſtered as ſuch, ſhall be treated as an alien ſhip. Though it was highly politic to confine the privileges of *Engliſh* ſhips to ſuch as ſhould be regiſtered, there ſeems to be no reaſon why *Engliſh* owners ſhould not be allowed to carry on foreign trade under the ſame advantages as foreigners, and liable to the ſame duties. By the 13 & 14 *Car.* 2. *c.* 11. *ſ.* 6. the officers of the cuſtoms in all the ports of *England* are directed to give an account to the collector of the port of *London* of all foreign built ſhips in their ports *Engliſh* owned, for which certificates have been granted, which account is to be tranſmitted to the *Exchequer* and there to remain of record; and it is enacted, that no foreign built ſhip not purchaſed before the 1ſt of *October* 1662, and expreſsly named in the ſaid acccount, though *Engliſh* owned and manned, ſhall enjoy the privileges of an *Engliſh* ſhip, but ſhall be liable to alien duties; with the exception of ſuch ſhips only as ſhall be captured by letters of marque or repriſal, and condemned in the *Admiralty*. The 15 *Car.* 2. *c.* 7. *ſ.* 6. which prohibits the importation of commodities of the growth of *Europe* into any of our colonies in *Africa*, *Aſia*, or *America*, unleſs ſhipped from *England* and in *Engliſh* built ſhipping, or ſuch as was purchaſed before the 1ſt of *October* 1662, and duly certificated, will not, I think, be found to carry the ſubject of *Engliſh* ownerſhip beyond the preceding act. The next material act is the 7 & 8 *Will.* 3. *c.* 22. the ſecond ſection of which prohibits the importation of any goods whatſoever into our colonies in *Aſia*, *Africa*, or *America*, in any ſhip but what is of the built of *England*, *Ireland*, or the ſaid colonies: and the ſeventeenth ſection declares, that no ſhip ſhall be deemed or paſſed as a ſhip of *Engliſh* or plantation built until it ſhall be regiſtered by the owner in the manner and form directed by the act. Then follows a particular proviſion for the regiſtering of prize ſhips in a ſpecial manner; and ſmall veſſels of a certain deſcription employed in the rivers or on the coaſts of the plantations are excepted altogether. This act of King *William* applying only to the plantation trade, left the employment of all other ſhips not engaged in that trade, whether *Britiſh* built, or foreign built and *Britiſh* owned, exactly on the ſame footing as they ſtood before. Their ſituation ſeems not to have been altered till the paſſing of the 26 *Geo.* 3. *c.* 60. on which the preſent queſtion principally depends. After the beſt conſideration which I have been able to give that ſtatute, and after converſing upon it with the noble lord who framed it (*a*), as well as with the learned author of the treatiſe (*b*) to which it gave riſe, the determination I have come to is, that foreign built ſhips in *Britiſh* ownerſhip are not required to be regiſtered, and conſequently that this verdict muſt ſtand. The preamble of that act recites, "that it is proper that the advantages hitherto given by the legiſlature to ſhips owned and navigated by his majeſty's ſubjects ſhould from thenceforth be confined to ſhips wholly built and fitted out in his majeſty's dominions." The legiſlature thereby declared, that the time was then come when the policy of employing *Britiſh* built ſhipping excluſively in the commerce of this country might be employed in its utmoſt extent. But there is not a ſingle word in the preamble from which it may be collected that any other than *Britiſh* built ſhips are required to be regiſtered. The ſtatute enacts, that after the 1ſt of *Auguſt* 1786, no foreign built ſhip except prizes, nor any ſhip built upon a foreign bottom, although *Britiſh* owned, "ſhall be any longer entitled to any of the privileges or advantages of a *Britiſh* built ſhip or of a ſhip owned by *Britiſh* ſubjects," but that ſuch advantages ſhall be confined to ſhips wholly of the built of this country or of ſome of our poſſeſſions. Then follows a proviſo, that nothing in the act contained ſhould prevent ſuch foreign built ſhips as before the 1ſt of *May* 1786 were *Britiſh* owned and regiſtered, from continuing to enjoy the privileges which they had before enjoyed; nor to deprive any ſhip built upon a foreign bottom, and regiſtered before that day, from continuing to enjoy the privileges to which ſhe was then entitled; nor to prevent any ſuch ſhip begun to be repaired or rebuilt before that day from being regiſtered under the act by virtue of an order of the commiſſioners of cuſtoms. This order they were authorized to grant if it ſhould appear to them upon oath that ſuch ſhip was *bonâ fide* ſtranded, being the ſole property of a foreigner, or that ſhe was a droit of *Admiralty*, and under either of theſe circumſtances was ſold to a *Britiſh* ſubject, and was ſo much repaired that two-thirds of her were *Britiſh* built. It is clear from the laſt proviſion

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(*a*) Lord *Hawkeſbury*, now the Earl of *Liverpool*.

(*b*) *Reeve's Law of Shipping*.

viſion that the legiſlature meant to require all thoſe ſhips to be regiſtered which were entitled to be regiſtered, and to prevent thoſe from being regiſtered which were not required to be regiſtered. On the third ſection of this act much reliance has been placed. The object of that clauſe was to extend the regiſtry introduced by the 7 & 8 *W.* 3. into the plantation trade to the *European* trade. It therefore enacts, that "all and every ſhip" having a deck, and being of fifteen ton burthen and upwards, and *Britiſh* owned, ſhall be regiſtered in the manner therein-after mentioned. It is quite clear, however, that this clauſe muſt be conſtrued according to the tenor of the act, and muſt be confined to ſuch ſhips as could be regiſtered in the manner therein-after directed; for it is impoſſible to contend, that becauſe the legiſlature uſes the words "all and every ſhip," it meant therefore to require even thoſe ſhips to be regiſtered which, as appears from other parts of the act, were intended to be prevented from being regiſtered. By the ſixth ſection it is provided, that nothing in the act ſhall extend to require to be regiſtered any ſhip of war, or veſſel belonging to the royal family, or employed in inland navigation. And the 27 *Geo.* 3. *c.* 19. *ſ.* 8. further provides, that veſſels not exceeding thirty tons and not having a whole deck, and ſolely employed in the *Newfoundland* fiſhery, ſhall not be ſubject to be regiſtered. The general principle introduced by the 26 *Geo.* 3. being, that all *Britiſh* built ſhips ſhould be regiſtered, it became neceſſary to introduce theſe exceptions: and I am of opinion, that the words "not required to be regiſtered" employed in the ſixth ſection of the convoy act, cannot be ſatisfied by being applied to theſe clauſes, ſince the ſhips thereby excepted from the neceſſity of obtaining a certificate of regiſtry, from the nature of their employment can never be in a ſituation to require convoy. It has been argued, that as the twenty-eighth ſection of the 26 *Geo.* 3. *c.* 60. has given two ſorts of regiſtry, one relating to *Britiſh* built ſhips, and one to foreign built ſhips, all foreign built ſhips are therefore within the meaning of the latter ſort. But the meaning of the legiſlature upon this head is clear. It had been declared that all foreign built ſhips *Britiſh* owned, which had been regiſtered previous to the 1ſt of *May* 1786, ſhould continue to enjoy certain privileges; and the twenty-ninth ſection required that all the old regiſters of ſuch ſhips ſhould be delivered up and new ones granted; it is obvious, therefore, that the "certificate of foreign regiſtry for the *European* trade, *Britiſh* property, mentioned in ſection twenty-eight, was intended to apply to thoſe ſhips which, though foreign built, were to continue to enjoy the privileges to which their former regiſter entitled them. But it is impoſſible that it ſhould be intended to apply to ſuch foreign built ſhips as were not regiſtered before the 1ſt of *May* 1786, ſince its object was to prevent them from enjoying the privileges which that certificate was calculated to confer. It appears from *Reeve's Law of Shipping* (*a*), that as *Britiſh* built ſhips only were entitled to the plantation trade, the certificate of "*Britiſh* plantation regiſtry" was adopted by the deſire of the commiſſioners of the cuſtoms, to diſtinguiſh thoſe ſhips from foreign built ſhips *Britiſh* owned, which were entitled to the *European* trade, and to which the certificate of "foreign ſhips regiſtry for the *European* trade, *Britiſh* property," was given. The twenty-ninth ſection of that act alſo takes a diſtinction between thoſe ſhips which are *required* to be regiſtered from that time, *viz. Britiſh* built ſhips, and thoſe ſhips which are *entitled* to be regiſtered in conſequence of the previous certificate of regiſtry obtained by them; and then directs that both ſhall obtain regiſters. Subſequent to this act, therefore, all thoſe ſhips which are entitled to be regiſtered, are required to be regiſtered, and the thirty-ſecond ſection of the act ſubjects them to forfeiture in caſe they attempt to proceed to ſea without having been regiſtered. It is material to obſerve, that this very caſe ſhews in what manner the above ſtatute has been underſtood; for if the ſhip which was the ſubject of the preſent inſurance had been required to be regiſtered, ſhe would not have been permitted to clear out for ſea, not having in fact been regiſtered, but would have been ſeized as forfeited. The laſt ſection of 27 *Geo.* 3. *c.* 19. which was paſſed for the expreſs purpoſe of obviating doubts on the 26 *Geo.* 3. ſhews the intention of the legiſlature that the latter act ſhould have that conſtruction which has now been put upon it. It declares that all ſhips not entitled by the 26 *Geo.* 3. to the privileges of *Britiſh* built or *Britiſh* owned ſhips, and all ſhips not regiſtered according to the ſaid act, ſhall, although owned by *Britiſh* ſubjects, be deemed alien ſhips and be liable to the ſame penalties and forfeitures as alien ſhips. It is not ſaid that ſhips not regiſtered ſhall not be navigated or owned by *Britiſh* ſubjects; a *Britiſh* owner of a foreign built ſhip may engage in neutral trade, and will be liable to the alien duties, but

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(*a*) See pages 437, 8, 447, 8.

it was not the policy of the legiſlature to prevent *Britiſh* ſubjects from employing foreign ſhips in neutral trade, in as ample a manner as they can be employed by aliens. The 34 *Geo.* 3. *c.* 68. contains ſeveral proviſions for granting new certificates upon a transfer of property; but it appears to me to proceed upon the ſame ground as the 26 *Geo.* 3. and to regulate thoſe caſes only in which a title to a certificate having been given, a certificate is required to be obtained, and in which the parties obtaining it are to derive ſome advantage from it.

In this view of the ſubject we are all of opinion, that the objection taken cannot be ſupported, and therefore that the verdicts muſt ſtand.

Per Curiam, Rule diſcharged.

PARKE *v.* MEARS.

June 17th.

A bond having been executed by *A.*, and atteſted by one witneſs, was carried into an adjoining room, and ſhewn to *B.*, who was deſired to atteſt it alſo, which he accordingly did in the preſence of *A.*—Held that *B.* was a good witneſs to prove the execution.

DEBT on bond and verdict for the Plaintiff on the iſſue of *non eſt factum*, with liberty to the Defendant from Lord *Eldon* Ch. J. before whom the cauſe was tried, to move to ſet that verdict aſide and have a nonſuit entered, if the Court under the following circumſtances ſhould think the execution of the bond was not ſufficiently proved. The bond was executed in *Ireland*, and there were two atteſting witneſſes to it, one of whom, a perſon of the name of *Hearne*, was called at the trial to prove the execution. It appeared that the bond had been executed in a room adjoining to that in which *Hearne* was a few minutes previous to the time at which he was deſired to atteſt, but the Defendant himſelf was preſent, and heard the attorney requeſt the witneſs to atteſt this among many other deeds; the other atteſting witneſs however was ſtill in the room where the deed had been executed. It was proved alſo that *Hearne* knew the Defendant's handwriting, and that the Defendant knew he was acquainted with it, and that the Defendant himſelf had acknowledged the inſtrument.

Bayley Serjt. now moved for a rule *niſi* to enter a nonſuit, and contended, that as no ſubſequent acknowledgment (*a*) of the inſtrument by the Defendant, could diſpenſe with the regular proof of the execution of the deed, the caſe muſt ſtand as if none ſuch

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(*a*) *Abbot* v. *Plumbe*, *Doug.* 216. *Laing* v. *Raine*, *ante*, p. 85.

1800.

PARKE v. MEARS.

had been made; that the evidence of *Hearne* was inſufficient, as he was not preſent at the time of the execution, and that evidence ſhould have been produced to ſhew that the deed was not complete at the time *Hearne* was called on to atteſt, ſince if it was complete his atteſting ſubſcription was nugatory.

But *the Court* thinking the whole might be conſidered as one tranſaction, held the execution of the bond ſufficiently proved (*a*).

Bayley took nothing by his motion.

(*a*) In the caſe of *Grellier* v. *Neale* and others, *Peake N. P. Caſ.* 146. a point nearly analogous to the preſent deciſion ſeems to have ariſen. There "to prove a partnerſhip deed the Plaintiff's counſel called the ſubſcribing witneſs, who ſaid ſhe did not ſee the deed executed, but that *Neale* brought it to her and deſired her to put her name thereto as a ſubſcribing witneſs, which ſhe did," and this appears to have been deemed ſufficient proof of the execution of the deed by *Neale*.

June 19th.

NORTH and another *v.* LAMBERT.

Where the Plaintiff enters an appearance for the Defendant under the ſtatute, judgment may be ſigned without any demand of a plea.

IN this action the declaration was filed by the Plaintiffs on the 1ſt of *May*, and notice thereof given and a rule to plead entered in due time. On the 16th of the ſame month the Defendant having entered no appearance, the Plaintiffs entered one for him, and ſigned judgment without demanding a plea.

Shepherd Serjt. having on a former day obtained a rule *niſi* for ſetting aſide this interlocutory judgment and all ſubſequent proceedings thereon with coſts, on the ground of a demand of a plea being neceſſary;

Marſhall Serjt. now ſhewed cauſe, and contended, that where the Defendant does not enter an appearance, the Plaintiff has a right to ſign judgment without demanding a plea.

The Court on inquiry of the officers found the practice to be as ſtated on the part of the Plaintiffs, *viz.* that where the Defendant does not appear, judgment may be ſigned without any demand of a plea (*a*).

Rule diſcharged with coſts.

(*a*) *Reg. Gen. B. R. T.* 1 *G.* 2. *Reg. Gen. C. B. M.* 1 *G.* 2. *Jones* v. *Wilkinſon*, *Barnes*, 249. and *Palk* v. *Rendle*, 8 *T. R.* 465. But where the Defendant has appeared, judgment cannot be ſigned againſt him without a previous demand of a plea, though he has neglected to take the declaration out of the office. *Nott* v. *Oldfield*, *B. R.* 1 *Wilſ.* 134. and *White* v. *Dent*, *ante*, vol. 1. p. 341.

(IN THE EXCHEQUER CHAMBER.)

June 20th.

WALKER *v.* BAYLEY in Error.

If judgment for the Plaintiff on an attorney's bill be affirmed in the *Exchequer* chamber, that court will not allow *intereſt.*

THE Court of *King's Bench* having given judgment againſt the Plaintiff in error, in an action upon an attorney's bill, he brought a writ of error in this Court, which was afterwards nonproſſed and the judgment below affirmed.

Heath now moved that it might be referred to the clerk of the errors to compute intereſt on the judgment below, from the day of its being entered up to that of the affirmance; and obſerved, that the caſe of *Shepherd* v. *Mackreth*, 2 *H. Bl.* 284, in which it was firſt ſettled that intereſt might be given by this Court, was an action on an attorney's bill.

But *the Court* ſaid that ſimilar applications had been frequently made and refuſed; and that the Court in *Shepherd* v. *Mackreth* did not advert to the circumſtance of the action being brought upon an attorney's bill, their attention being only directed to the general queſtion, Whether intereſt could be given by this Court or not?

Heath took nothing by his motion.

DOE ex dem. BANKS *v.* BOOTH.

June 21ſt.

The truſtees under a turnpike act, having demiſed to one of ſeveral mortgagees ſuch proportion of the tolls ariſing from the road and of the toll-houſes and toll-gates for collecting the ſame as the ſum advanced by him bore to the whole ſum raiſed on the credit of the tolls, the mortgagee brought ejectment for the toll-houſes and toll-gates, in order to repay himſelf the intereſt due to him.—Held that he might well maintain his action, notwithſtanding a clauſe in the act that all the mortgagees ſhould be creditors upon the tolls in equal degree.

EJECTMENT for three toll-houſes with the toll-gates thereunto belonging. The cauſe was tried before *Rooke* J. at the ſpring aſſizes at *York*, when a verdict was found for the leſſor of the Plaintiff, ſubject to the opinion of the Court on a caſe which ſtated in ſubſtance, that the truſtees under an act of parliament made in the 17 *Geo.* 3. for repairing and widening the road from *Halifax* to *Sheffield*, by deed of the 5th *April* 1779, in conſideration of 100 *l.* paid by the leſſor of the Plaintiff to the treaſurer of the ſaid road according to the direction of the ſtatute, did grant, bargain (*a*), ſell, and demiſe to the leſſor of the Plaintiff ſuch proportion of the tolls ariſing from the road and of the

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(*a*) This was according to the form of the mortgage inſerted in the act, page 743.

1800.

Doe ex. dem. Banks *v.* Booth.

turnpikes and toll-houſes for collecting the ſame, (being the premiſes mentioned in the declaration,) as the ſaid ſum of 100 *l.* ſhould bear to the whole ſum due and owing on the credit thereof, to be holden from the 5th of *April* 1779 during the continuance of the above ſtatute, till the ſaid ſum of 100 *l.* with intereſt at 5 *l. per cent.* ſhould be paid; that the ſaid 100 *l.* with four years intereſt up to the 5th of *April* 1799 is ſtill due; that the ſum of 3600 *l.* 10 *s.* is the whole principal money due and owing on the credit of the ſaid tolls and the turnpikes and toll-houſes for collecting the ſame; that the ſaid tolls, turnpikes, and toll-houſes on the 22d of *September* 1798, were demiſed to the Defendant for two years from the 1ſt of *October* 1798 at 303 *l. per annum*, and that he is now in poſſeſſion thereof and has paid all rent due; that the coſts of procuring the above act, as alſo of procuring another act of 38 *Geo.* 3. for continuing the ſame for 21 years have been paid, except the ſum of 12 *l.* for payment of which the treaſurer has ſufficient money in his hands; that there is due to other mortgagees of the ſaid tolls, turnpikes, and toll-houſes, three years intereſt on the ſeveral ſums ſecured to them by their reſpective mortgages up to the 5th of *October* laſt, and to ſome of them four years intereſt; that one year's intereſt on the ſaid ſum of 100 *l.* due the 5th of *April* 1796 was in *March* 1799, and before any intereſt had been paid to any other creditors or mortgagees on the tolls due in 1796 tendered to the leſſor of the Plaintiff, being as much as had or has been paid to any of the other mortgagees, which he then refuſed, inſiſting on the whole intereſt being paid; that the intereſt which became due in 1797 and ſince, has not yet been paid to any of the creditors or mortgagees, there not being ſufficient money to pay the ſame and what is due for the repairs of the road; that at the time when the ejectment was ſerved, the treaſurer had in his hands 58 *l.* more than ſufficient to pay the coſts of procuring both the above-mentioned acts; that the leſſor of the Plaintiff gave notice to the Defendant, that the ejectment was brought for the purpoſe of recovering the poſſeſſion of the toll-houſes with the toll-gates thereto belonging, to the intent that the Plaintiff might pay and apply the money ariſing from the toll-gates in diſcharge of the intereſt due upon the ſum of 100 *l.* by him advanced on the credit of the tolls ariſing from the ſaid toll-gates, and not to recover ſuch poſſeſſion to reimburſe him the ſaid principal ſum of 100 *l.* ſo advanced as aforeſaid, or any part thereof.

Williams

Doe ex dem. Banks v. Booth.

Williams Serjt. was to have argued in ſupport of the verdict, but the Court called on the other ſide to begin.

Clayton Serjt. for the Defendant. This ejectment cannot be ſupported, being contrary to the policy of the act of parliament. The truſtees and the leſſor of the Plaintiff do not ſtand in the relation of a common mortgagor and mortgagee, for the truſtees do not act for their own benefit but for the benefit of the public. In page 735 of the act, the truſtees are authoriſed to remove, alter, or diſcontinue the turnpike gates or toll-houſes or any of them as they ſhall think expedient, and in page 738 they are "authoriſed and empowered from time to time as they ſhall think proper to leſſen, vary, or alter all or any part or parts of the tolls thereby granted at all, any, or either of the turnpikes within their reſpective diſtricts, and to raiſe the ſame again ſo as they do not exceed the tolls by that act granted, and ſo as ſuch reduction be with the conſent of the ſeveral perſons who ſhall be entitled to three-fifth parts of the money then due on the credit of the tolls." Theſe diſcretionary powers in the truſtees however will be nugatory, if the mortgagee may at any time take into his own hands the management of any of the toll-gates when recovered by action. Indeed in page 739 the truſtees are empowered to leaſe the tolls for three years, and apply the money ariſing therefrom in ſuch manner as the tolls ſo leaſed are directed to be applied; now if the Plaintiff recovers, the above proviſion of the act will be altogether ſuperſeded, ſince the leaſes granted under it will be of no avail. Beſides, in page 745, it is directed that all perſons to whom any mortgage ſhall be made under the act, ſhall in proportion to the ſum mentioned in the mortgage be creditors on the tolls in equal degree one with another, "and ſhall have no preference in reſpect of the priority of any money advanced." But if any one mortgagee be allowed to recover, he will thereby gain a priority denied him by the act. In *Fairtitle d. Myther* v. *Gilbert*, 2 *T. R.* 171. which was nearly ſimilar to this caſe, the words of Mr. Juſtice *Aſhurſt* are, "if any creditor had a power to enter and take poſſeſſion of the toll-gates he would gain a priority which the act has denied, and it is very fit that this ſhould not be taken out of the hands of the truſtees, becauſe they are truſtees for all the creditors, and were conſidered by the legiſlature as the moſt proper perſons to have the whole management of every thing to be done in purſuance of the act: it was foreſeen that the whole ſum wanted would not be advanced by any one perſon, and therefore for the encouragement and ſecurity of all perſons who were willing to advance money, it was neceſſary that the collection of the tolls ſhould remain with the truſtees." It is true that in that caſe the toll-houſes and toll-gates were mortgaged as well as the tolls, though the words of the act only authoriſed the truſtees to mortgage the latter; but it ſhould ſeem that under a power to mortgage the tolls, a power to mortgage the toll-gates as incident to it would paſs; and though ſome ſtreſs was laid upon this objection by the Court, yet the principal ground of the deciſion ſeems to have been the inconvenience which would enſue if any one mortgagee were permitted to take the toll into his own hands. Beſides, the leſſor of the Plaintiff is only entitled to a proportion of the tolls and toll-houſes. If therefore he were to recover ſuch proportion only, he would not thereby be authoriſed to collect more than that proportion of the tolls, not being agent for the other creditors: and it would be impoſſible from the nature of the thing to collect that proportion only. If it be contended that the mortgagee will be without remedy, it may be anſwered, that the truſtees are like other public officers liable to be puniſhed for any miſapplication of the money entruſted to them; or the mortgagee may recover his proportion when collected in an action for money had and received.

Lord **Eldon** Ch. J. The caſe of *Fairtitle* v. *Gilbert* admits all that is neceſſary for the leſſor of the Plaintiff to contend. The mortgage executed in that caſe was a mortgage of the whole, not of any aliquot part; and the toll-houſes and toll-gates were alſo inſerted in the mortgage, though the act only authoriſed the truſtees to mortgage the tolls. The queſtions made were; 1ſt, Whether the truſtees had any authority to mortgage the toll houſes and toll-gates? And 2dly, if they had not, Whether they were not eſtopped by their own deed? The Court held that the act gave no authority to mortgage the toll-houſes and toll-gates, and that as the truſtees were not acting for their own benefit, but for the benefit of the public, they were not eſtopped. It was there argued that the only mode of effectuating the conveyance of the tolls, was to enable the truſtees to mortgage the toll-gates. But in anſwer to this, Mr. Juſtice *Aſhurſt* obſerved, that " the act expreſsly " gives the truſtees power to mortgage the tolls, but the reaſon " why it does not give them a further power is, becauſe no creditor

“ is to have a preference. Now if any creditor had a power to “ enter and take poſſeſſion of the toll-gates he would gain a “ priority which the act has denied.” But why would he have gained a priority? Becauſe the mortgage was a mortgage of all the tolls, not of any proportion: for I deny that in the latter caſe any priority would have been gained, ſince the leſſor of the Plaintiff would become the bailiff of the reſt of the creditors as to all except his own proportion. It was thought that if a power had been given to mortgage the toll-gates a difficulty would have ariſen, by giving a preference, which was contrary to the intention of the act. But it does not appear to me that this difficulty would have ariſen even if ſuch a power had been given. For I ſhould have been inclined to hold, that whatever were the form of the demiſe, it could only operate ſo as to effectuate the act; that is, ſo that every other creditor ſhould receive his due proportion, for which purpoſe the mortgagee muſt have ſtood in the ſituation of bailiff or truſtee for all the other creditors. The act in this caſe however ſeems calculated to meet the very difficulty which the Court there felt: for this act empowers the truſtees “ to demiſe or mortgage the ſaid “ tolls or any part or parts thereof and the turnpikes and toll-houſes for collecting the ſame (a).” If any one perſon advanced the whole ſum, then the whole was to be mortgaged; if ſeveral, then the form of the mortgage inſerted in the act ſhews, that each creditor was to have in mortgage only ſuch proportion of the tolls as the ſum advanced by him ſhould bear to the whole ſum advanced. All the difficulty therefore ſuggeſted in the argument of the caſe in the *King's Bench* is obviated by this act. For this act does contain a power to demiſe the toll-houſes and toll-gates; and it was admitted in the *King's Bench* that if the act in that caſe had contained ſuch a power, the ejectment might have been maintained: at the ſame time this act cures the difficulty which was thought to be the conſequence of allowing an ejectment to be maintained, by requiring that a proportion of the tolls only ſhould be mortgaged to each creditor. There is a great difference between a demiſe of tolls and of toll-houſes. The former only gives a perſonal intereſt, in reſpect of which an action for money had and received may be maintained, the latter gives an intereſt in land which is within the ſtatute of mortmain. The truſtees in this caſe have executed an indenture

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(a) Page 743.

1800.

Doe ex dem. Banks *v.* Booth.

under the act, the effect of which was, to transfer the title veſted in them. Being authoriſed to grant a real intereſt in the toll-houſes, all the conſequences of law muſt attach upon that intereſt unleſs excluded by the act; and it is not for this Court to ſay that the legiſlature ought to have reſtrained the mortgagee from ſeeking his remedy by ejectment. The money advanced by the mortgagee would be very ill ſecured if his only remedy was either an application to the vindictive power of the Court of *King's Bench*, or a ſuit in *Chancery* in which all the other thirty-five mortgagees muſt be made parties. With reſpect to the action for money had and received, it would be a ſufficient defence for the truſtees to ſhew that they had diſtributed all the money received according to the proviſions of the act.

Per Curiam, Judgment for the Plaintiff.

June 21ſt.

WATSON *v.* CHRISTIE.

In treſpaſs for aſſault and battery and not guilty pleaded, the jury are not at liberty to take into conſideration the circumſtances of the aſſault and battery, with a view to reduce the verdict below the amount of the damage actually ſuſtained, if thoſe circumſtances could have been pleaded.

TRESPASS for aſſaulting and beating the Plaintiff. Plea not guilty. At the trial it appeared that the Defendant was the captain of a ſhip, and the Plaintiff one of his crew; that the Plaintiff while under the Defendant's command had been ſo ſeverely beaten by order of the Defendant, that he had ever ſince that time been in a ſtate of extreme ill health, and was likely to continue ſo during the reſt of his life, which he was in ſome danger of ultimately loſing in conſequence of the aſſault. On the other hand, it was offered to be ſhewn that the beating in queſtion was given by way of puniſhment for miſbehaviour on board the ſhip, and it was inſiſted that the conduct of the Defendant at the time of the aſſault being neceſſarily in evidence proved that miſbehaviour.

Lord *Eldon* Ch. J. before whom the cauſe was tried, directed the jury, that the only queſtions for their conſideration were, Whether the Defendant was guilty of the beating? and what damages the Plaintiff had ſuſtained in conſequence of it? that although the beating in queſtion, however ſevere, might poſſibly be juſtified on the ground of the neceſſity of maintaining diſcipline on board the ſhip, yet that ſuch a defence could not be reſorted to unleſs put upon the record, in the ſhape of a ſpecial juſtification; that the Defendant had not ſaid on the record that this was diſcipline, or juſtified it on any ground; that much evil beyond the mere act of wrong had been actually ſuffered; which evil had been occaſioned by a cauſe which the Defendant admitted he could not juſtify; that in his Lordſhip's judgment therefore, the evil actually ſuffered in conſequence of what was not juſtified ought to be compenſated for in damages; that the jury ſhould give damages to the extent of the evil ſuffered, without leſſening them on account of the circumſtances under which it was inflicted; that if they gave damages beyond a compenſation for the injury actually ſuſtained they would give too much, but that if they gave leſs they would not give enough.

The jury found a verdict for 500 *l.* being all the damages laid in the declaration.

Shepherd Serjt. now moved for a rule calling on the Plaintiff to ſhew cauſe why this verdict ſhould not be ſet aſide and a new trial be had, on the ground of the damages being exceſſive, and becauſe the jury ought not to have been directed to exclude from their conſideration thoſe circumſtances which tended to ſhew the neceſſity of that puniſhment being inflicted which was the cauſe of the action; for that although the Plaintiff might perhaps be entitled to ſome damages, ſince the circumſtances alluded to did not amount to a legal defence, yet the Defendant had a right to the benefit of thoſe circumſtances by way of mitigation (*a*).

(*a*) Upon this ſubject there ſeems to be ſome contradiction in the books. Thus in *aſſumpſit* and *non-aſſumpſit* pleaded, a diſcharge was admitted in evidence by *Hale* Ch. J. in mitigation of damages; though he ſaid that *exoneravit* ought to have been pleaded. *Abbot* v. *Chapman*, 2 *Lev.* 81. In like manner a releaſe was admitted, *Beckford* v. *Clarke*, 1 *Sid.* 236. And *Holt* Ch. J. in caſe for words allowed the truth of the words to be given in evidence in mitigation of damages. *Smithies* v. Dr. *Harriſon*, 1 *Ld. Ray.* 727. But the more reaſonable rule ſeems to have been laid down by *Price* Baron, in a caſe of *Dennis* v. *Pawling*, *An. Do.* 1716. *Vin. Abr.* tit. *Evidence*, (I. b.) pl. 16. who in caſe for words refuſed to admit any thing in evidence which tended to juſtify the words, though in mitigation of damages only; ſaying, "that any thing which tended to ſhew a provocation or any tranſaction between the parties giving occaſion for ſpeaking the words was proper in the Defendant to make out, *becauſe theſe matters cannot be pleaded.*" Indeed ſo early as 21 *H.* 8. in treſpaſs *quare clauſum fregit* and not guilty pleaded, where the Defendant offered to give in evidence that the treſpaſs was committed by his cattle through the default of the Plaintiff's fences, and this evidence was rejected becauſe the matter ought to have been pleaded, the Defendant's counſel urged that it might be received in mitigation of damages; but *Shelley* J. would not allow it, leſt the jury ſhould be induced to find a verdict contrary to law, and thereby incur an attaint. *Keilw.* 203. *b.* Subſequent to the caſe of *Smithies* v. Dr. *Harriſon*, viz. in *Mich.* 17 *Geo.* 2. *Lee* Ch. J. refuſed to allow the truth of words ſpoken to be proved in mitigation of damages, ſaying that at a meeting of all the judges, a large majority of them had determined not to allow it in

But *The Court* were of opinion that his Lordſhip's direction was perfectly right in point of law, and that it did not appear from the report, that the damages given by the jury were exceſſive.

Shepherd took nothing by his motion.

June 21ſt.

MARSH v. HUTCHINSON.

An *Engliſhman* employed in the ſervice of the *Britiſh* Government, reſiding in a foreign country and having lands there, upon the ceſſation of his employment in conſequence of war between the two countries, ſent his wife and family to this country, but continued to reſide abroad, himſelf. Held that the wife not having repreſented herſelf as a *feme-ſole* was not liable to be ſued as ſuch.

THIS was an action for goods ſold and delivered by the Plaintiff to the Defendant. Plea *non aſſumpſit.*

The cauſe was tried before *Marſhall* Serjt. at the ſummer aſſiſes for *Norfolk* 1799: the Plaintiff's demand was for coals ſupplied to the Defendant during the laſt three or four years, and the defence was coverture. It appeared that the Defendant's huſband was an *Engliſhman*; that in 1783 he left this country, and had occaſionally been here ſince that period; but that about ten years ago having purchaſed the appointment of agent for the *Engliſh* packets at the *Brill* in *Holland*, he had reſided there ever ſince; that he was poſſeſſed of madder grounds in that country, from the cultivation of which he derived conſiderable profit; that on the irruption of the *French* into *Holland* in 1795, his employment as agent having ceaſed, he ſent the Defendant together with his wife and family to reſide in this country, but remained himſelf in *Holland* to look after his madder grounds, and alſo with a view to recover his ſituation if the intercourſe between *England* and *Holland* ſhould be re-eſtabliſhed; that the Defendant lived at *Aylſham* in *Norfolk*, and was there conſidered to be a married woman. Upon this the Plaintiff's counſel inſiſted that the Defendant's huſband being domiciled in a foreign country from which he was not likely to return, the Defendant muſt be treated as a *feme-ſole*, and therefore capable of making contracts to bind herſelf. The learned Serjeant directed the jury to aſcertain the amount of the demand;

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future, but that it ſhould be pleaded, and that this was now a general rule. *Underwood* v. *Parks*, 2 *Str.* 1200. In ſupport of that part of the propoſition laid down by *Price* Baron, that what cannot be pleaded may be given in evidence, the caſe of *Coote* v. *Berty*, 12 *Mod.* 232. may be referred to, where it was ſaid, that in treſpaſs for criminal converſation with the Plaintiff's wife, licence of the huſband or the bad character of the wife could not be pleaded in bar, but that thoſe matters might be given in evidence in mitigation of damages.

1800.

Marsh *v.* Hutchinson.

mand; but conceiving that the Defendant had ſufficiently proved her coverture, and that her huſband's reſidence in *Holland* did not, under all the circumſtances, enable her to bind herſelf by her own contract as a *feme-ſole*, nonſuited the Plaintiff, with liberty to move to ſet that nonſuit aſide, and enter a verdict for the Plaintiff to the amount aſcertained by the jury.

Accordingly in *Michaelmas* term laſt a rule *niſi* having been obtained for that purpoſe,

Sellon Serjt. ſhewed cauſe, and after obſerving that the caſes reſpecting coverture might be divided into two claſſes, firſt, that of ſeparate maintenance ſecured to the wife; ſecondly, that which proceeded on the old exceptions of abjuration, and exile; ſaid, that he ſhould diſmiſs the conſideration of the former altogether: with reſpect to the ſecond claſs he argued, that the principle on which they proceeded was, that the huſband had it not in his power to return to this country. *Margery Weyland*'s caſe, *Ryley, Plac. Parl.* 66. *Lady Maltraver*'s caſe, 10 *Ed.* 3. 53. *Sybell Belknap*'s caſe, 1 *H.* 4. 1. *a.* *Counteſs of Portland* v. *Prodgers*, 2 *Vern.* 104. *Sparrow* v. *Carruthers*, cited 2 *Bl.* 1197. 1 *T. R.* 7. He obſerved that the more modern authorities had been determined on the foundation of a caſe, upon which more ſtreſs had been laid than it deſerved; namely, *Deerly* v. *the Ducheſs of Mazarine*, 1 *Salk.* 116. 2 *Salk.* 646.; for that in fact that caſe was not decided on a principle of law but on an equitable point of practice: the reporter himſelf having entitled it in the margin, "New Trial not granted for miſtake in point of law, againſt the equity of the caſe;" that it was alſo thrown out there that the huſband was an alien and that a divorce might be intended, and indeed Lord *Camden* in the caſe of *Goſlin* v. *Wilcock*, 2 *Wilſ.* 308. had declared, that "the jury in the caſe of *Deerly* v. *the Ducheſs of Mazarine* were liable to an attaint;" that moreover in *Walford* v. *Ducheſſe de Pienne*, *Eſp. Caſ. N. P.* 554. *Franks* v. *Ducheſſe de Pienne*, *ib.* 587. and *De Gaillon* v. *L'Aigle* (*a*), the diſtinction was taken that the huſband was an alien; that in thoſe caſes there was a complete deſertion of the kingdom by the huſband, and no *animus revertendi* to be preſumed, whereas the huſband in the preſent caſe being an *Engliſhman*, muſt be preſumed to have the *animus revertendi*.

(*a*) *Ante*, 1 vol. 357.

Lens

1800.

MARSH *v.* HUTCHINSON.

Lens Serjt. *contrà* argued, that as in this caſe it did not appear that the Defendant on the one hand repreſented herſelf as a ſingle woman, or that the Plaintiff on the other knew the circumſtances of her ſituation, the queſtion, Whether the latter were entitled to ſue the former as a ſingle woman? muſt depend upon a ſound conſtruction of that modification of the rule of law, that a *feme-covert* cannot be ſued, which had already prevailed; that the firſt claſs of caſes alluded to on the other ſide, proved that the general rule of law was ſubject to modification; and that the ſecond claſs of caſes, ſome of which were as ancient as the time of *Edward* the firſt, were in principle directly applicable to the preſent; that principle being, that where the huſband is beyond the proceſs of the Courts and therefore not amenable to them, the rule of law ceaſes, that the liability of the wife is transferred to the huſband; that though in *Deerly* v. *the Ducheſs of Mazarine* one point decided was, that the Court would not grant a new trial againſt the equity of the caſe, yet that another principle to be drawn from that caſe is, that the wife of a perſon not within the reach of the law is liable to be ſued; that on the ſame principle proceeded the more modern caſes of *Walford* v. *Ducheſſe de Pienne*, *Franks* v. *Ducheſſe de Pienne*, and *De Gaillon* v. *L'Aigle;* that whether the huſband be a foreigner or an *Engliſhman* can make no difference, provided he be beyond the juriſdiction of the Court; that it mattered not whether the abſence of the huſband be for life or a ſhorter period, ſince it appeared both from *Belknap*'s caſe and from *Sparrow* v. *Carruthers*, that a temporary ſuſpenſion of the capacity of the huſband to be ſued, reſtored to the wife her liability for her own contracts; that the mere circumſtance of the huſband, in this caſe, being an *Engliſhman*, could not raiſe the preſumption of an *animus revertendi*, he having been ſo long abſent, having purchaſed property in *Holland*, and being domiciled there; and that ſuch a preſumption, if it could be raiſed, would be rebutted by his having made his election to remain in *Holland*, at the time when he found it neceſſary for temporary ſecurity to ſend his wife and family to *England*.

Lord **ELDON** Ch. J. Suppoſe an *Engliſhman* going over to *Holland*, and reſiding there as agent for the *Britiſh* packets, ſhould continue engaged in that ſingle employment for 20 years, and ſhould then die there, is it clear that his perſonal effects ought to be diſtributed according to the law of *Holland?* In the caſe of

Bruce

1800.

Marsh *v.* Hutchinson.

Bruce v. *Bruce* (*a*) which I argued in the Houſe of Lords, the queſtion was, Whether the perſonal eſtate of a *Scotſman* who had died

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(*a*) The Reporters have been favoured with the following note of that caſe.

(In the Houſe of Lords.)

Elizabeth and *Margaret Bruce* daughters of *David Bruce*, deceaſed, and *James Hamilton* huſband of the ſaid *Margaret*, Appellants.

James Bruce, Reſpondent, *April* 1790.

William Bruce, ſon of the late Mr. *Bruce* of *Kinnaird*, left *Scotland* when young, and was for ſome years in the navy. In 1767, he went to the *Eaſt Indies* in the military ſervice of the company, and continued there till his death in 1783, having riſen to the rank of a major. In many letters to his friends in *Scotland* he expreſſed an anxious deſire to return and ſpend the remainder of his life in his native country; particularly he wrote to that purpoſe a few months before his death, and he was in the courſe of remitting home his money, meaning ſoon to follow it himſelf, when he died. At that time a part of his fortune was in the hands of people in *England*, and he had remitted a conſiderable ſum to his attornies in *Scotland*, in bills on the *India* company which were on the way home at the time of his death. Having made no will, the queſtion aroſe, Whether his effects were to paſs according to the diſtribution of the law of *England*, in which caſe Mr. *Bruce* of *Kinnaird*, his brother of the half blood would have a ſhare; or the law of *Scotland*, which prefers the whole blood excluſively. It was inſiſted by Mr. *Bruce*, that according to a long train of deciſions in the Court of Seſſion [1], (with an exception in the year 1744,) [2] the law of the place where the effects are ſituated is the rule, and he contended that here the money was either actually in *England* or in bills due by the *Engliſh Eaſt India* company; and even if the *domicile* of the deceaſed be the rule, major *Bruce* was at the time of his death *domiciled* in *India*, a country ſubject to the laws of *England*. On the other hand, the brother and ſiſters of the full blood pleaded, that according to the *Law of Nations*, adopted in caſes of this kind by all the countries of *Europe*, and by the civil law, the diſtribution of the perſonal eſtate of an inteſtate is to be governed by the law of the place where he had his *domicile*, and that a man could not have a *domicile*, but at a place where he had taken up reſidence *with intention to remain*; that major *Bruce* never intended to remain in *India*, and had no fixed habitation there, and therefore *Scotland*, where he was born, and to which he expreſſed his reſolution to return, and was actually preparing to go, was his country, and in the eye of law the place of his *domicile* all along. The Lord Ordinary (Lord *Monboddo*) pronounced the following interlocutor: "Finds, 1mo, That as major *Bruce* was in the ſervice of the *Eaſt India* Company, and not in a regiment on the *Britiſh* eſtabliſhment which might have been in *India* only occaſionally, and as he was not upon his way to *Scotland* nor had declared any fixed and ſettled intention to return thither at any particular time, *India* muſt be conſidered as the place of his *domicile*. 2do, That as all his effects were either in *India* or in the hands of the *Eaſt India* Company, or of others his debtors in *England*, though he had granted letters of attorney to ſome of his friends in *Scotland*, empowering them to uplift thoſe debts, his *res ſitæ* muſt be conſidered to be in *England*: therefore finds, that the *Engliſh* law muſt be the rule in this caſe for determining the

[1] The authorities in the *Scots* law referred to were *Henderſon's Bairns Durie*, 88. *Melvill* v. *Drummond Durie*, 723. *Shaw* v. *Lewins*, 1 *Stair's Deciſions*, 252. *Brown* and *Duff* v. *Bizet*, 1 *Stair's Dec.* 398. *Dirleton's Dec.* 10. *S. C. Brown* v. *Brown*, Lord *Kilkerran*, voce *Foreign*, fol. 199. *Falconer*, 11. *S. C. Morriſon* v. *Sutherland*, Lord *Kilkerran*, voce *Foreign*, fol. 209. *Mortimer* v *Lorimer*, *Erſkine's Inſtitute*, fol. 661. *in notis*. ed. 1773. *Davidſon* v. *Elcherſon*, *Faculty Collection*, 13th *January* 1778. *Maclean* v. *Henderſon*, *ibid. eod. die*. *Erſkine's Inſtitute*, *B.* iii. *tit.* 9. *ſ.* 4. Lord *Kaim's Princ. of Equity*, *B.* iii. *c.* 8. *ſ.* 4. The authorities in the *Law of Nations* referred to in the above caſe, are collected in *Hunter* v. *Potts*, 4 *T. R.* 184. *in notis*; in the argument of which laſt caſe may alſo be found the authorities in the *Law of England* which bear upon the ſubject.

[2] *Brown* v. *Brown*.

died in the *Eaſt Indies*, in the ſervice of the company, ſhould be diſtributed according to the law of *Scotland*, which was his *domicilium*

ſucceſſion of major *Bruce*, and conſequently that *Janes Bruce* of *Kinnaird* is intitled to ſucceed with the defenders his brother and ſiſters *conſanguinean*; and decerns and declares accordingly."

The Court of Seſſion having affirmed the Lord Ordinary's interlocutor, the children of the full blood entered their appeal.

After counſel on both ſides had been heard, the Chancellor (Lord *Thurlow*) ſpoke to the following effect: " That as he had no doubt that the decree ought to be affirmed, he would not have troubled their Lordſhips by delivering his reaſons, had it not been preſſed with ſome anxiety from the bar, that if there was to be an affirmance the grounds of the determination ſhould be ſtated, to prevent its being underſtood that the whole doctrine laid down by the interlocutor appealed from, and particularly that on which it was ſaid the judges of the Court of Seſſion proceeded principally in this and former caſes ſimilar to it, had the ſanction of this Houſe. It had been urged that the judgment ſhould contain a declaration of what was the law, and he had revolved in his own mind whether that would be expedient. It was not uſual in this Houſe, or in the courts of law, to decide more than the very caſe before them, and he had particular reluctance to go farther in the preſent caſe, becauſe, as had been ſtated with great propriety by one of the Reſpondent's counſel, various caſes had been decided in *Scotland* upon principles, which if this Houſe were to condemn, a pretext might be afforded to diſturb matters long at reſt. But he could have no objection to declare what were the grounds of his own opinion, and how far he coincided with the rules laid down by the Court below. Two reaſons were aſſigned for having declared that the diſtribution of major *Bruce*'s perſonal eſtate ought to be according to the law of *England*: 1ſt, That *India*, a country ſubject to that law, was to be held as the place of his *domicilium*, and certain circumſtances were mentioned from whence that was inferred: theſe he conſidered only as circumſtances in the caſe, and not as neceſſary circumſtances; that is, though theſe had been wanting, the ſame concluſion might have been inferred from other circumſtances. In his mind, all the circumſtances in major *Bruce*'s life led to the ſame concluſion. The 2d reaſon aſſigned by the interlocutor was, That the property of the deceaſed, which was the ſubject of diſtribution was, at the time of his death, in *India* or in *England*. As to this he founded ſo little upon it, that he profeſſed not to ſee how the property could be conſidered as in *England*. It conſiſted of debts owing to the deceaſed, or money in bills of exchange drawn on the *India* Company. Debts have no *ſitus*, they follow the perſon of the creditor. That propoſition in the interlocutor therefore fails in fact. But the true ground upon which the cauſe turned was, the deceaſed being *domiciled* in *India*. He was born in *Scotland* but he had no property there. A perſon's origin in a queſtion of, Where is his *domicile?* is to be reckoned as but one circumſtance in evidence which may aid other circumſtances; but it is an enormous propoſition that a perſon is to be held *domiciled* where he drew his firſt breath, without adding ſomething more unequivocal. A perſon's being at a place is *primâ facie* evidence that he is *domiciled* at that place, and it lies on thoſe who ſay otherwiſe to rebut that evidence. It may be rebutted no doubt. A perſon travelling;—on a viſit;—he may be there for ſome time on account of his health or buſineſs;—a ſoldier may be ordered to *Flanders*, and be detained at one place there for many months;—the caſe of ambaſſadors, *&c.* But what will make a perſon's *domicile* or home, in contradiction to theſe caſes muſt occur to every one. A *Britiſh* man ſettles as a merchant abroad; he enjoys the privileges of the place; he may mean to return when he has made his fortune, but if he dies in the interval, will it be maintained that he had his *domicile* at home? In this caſe major *Bruce* left *Scotland* in his early years; he went to *India*; returned to *England*, and remained there for two years without ſo much as viſiting *Scotland*, and then went again to *India* and lived there ſixteen years and died. He meant to return to his native country *cilium originis*, or of the province of *Canterbury* which extends to the *Eaſt Indies?* Lord *Thurlow* in his judgment adopted this diſtinction; that if he had gone out in a King's regiment, and died in the King's ſervice, his *domicile* would not have been changed; but that having died in the ſervice of the company, it was changed. Had the Defendant's huſband been engaged in the ſervice of government only, it might have made a material difference in the caſe. The queſtion however in the view of the law may perhaps be reduced to this, Whether the Defendant's huſband having been employed in *Holland* by the *Britiſh* government, he has remained there after the ceſſation of that employment merely to collect what the civilians call *ſummas rerum*, or with any further views? And yet if it were clear that this man never intended to return to *England*, and might therefore be repreſented as incapable of being ſued in this country, before we come to a concluſion upon the caſe, there are many conſiderations to be weighed. In the caſe of abjuration, and in thoſe other caſes which amount to a civil death, I think that I underſtand the ſituation in which the wife was placed. The huſband being civilly dead, the wife was entitled to dower of his land in the ſame manner as if he were actually dead (*a*); ſo ſhe became entitled to the enjoyment and

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country it is ſaid, and let it be granted; he then meant to change his *domicile*, but he died before actually changing it. Theſe (his Lordſhip ſaid) were the grounds of his opinion, though he would move a ſimple affirmance of the decree, but he would not heſitate as from himſelf, to lay down for law generally, That perſonal property follows the perſon of the owner, and in caſe or his deceaſe muſt go according to the law of the country where he had his *domicile*; for, the actual *ſitus* of the goods has no influence. He obſerved that ſome of the beſt writers in *Scotland* lay this down expreſsly to be the law of that country; and he quoted Mr. *Erſkine's Inſtitute* as directly in point. In one caſe it was clearly ſo decided in the Court of Seſſion, and in the other caſes which had been relied on as favouring the doctrine of *lex loci rei ſitæ*, he thought he ſaw ingredients which made the Court, as in the preſent caſe, join both *domicilium* and *ſitus*. But to ſay that the *lex loci rei ſitæ* is to govern though the *domicilium* of the deceaſed be without contradiction in a different country, is a groſs miſapplication of the rules of civil law and *jus gentium*, though the law of *Scotland* on this point is conſtantly aſſerted to be founded on them."

Decree accordingly affirmed ſimply.

(*a*) This is ſupported by the authority of *Bracton, lib.* 4 *Tract.* 6. *c.* 7. *fo.* 301, *b. Britton, cap.* 106. *fo.* 251. and *Fleta, lib.* 5. *cap.* 28. In theſe books the wife ſeems to have been conſidered as equally entitled to dower in the caſe of a civil as of a natural death. With reſpect to entering into religion, they treat the wife as dowable where the huſband is actually profeſſed, though not where he is in a ſtate of probation only; and lay it down that the fact of profeſſion in ſuch caſe muſt be tried by the certificate of the ordinary. It was ſaid, however, in *M.* 32 *Edw.* 1. *Fitz. Abr.* tit. *Dower*, pl. 176. by *Bereford*, that although the huſband be profeſſed, the wife ſhall not have her dower until his natural death; this doctrine has

1800.

MARSH *v.* HUTCHINSON.

and profits of her own land, though if he had not been civilly dead, he would have been ſeiſed of the lands in her right (*a*): and indeed ſhe might have ſued for an aſſault in her own name, and might have been made a Defendant without her huſband, in all caſes in which the huſband muſt otherwiſe have been joined. In thoſe caſes there is no difficulty, becauſe the fiction of law which conſiders the huſband as civilly dead, puts the wife in the ſame ſituation as if he were actually dead. With reſpect to the more modern caſes, in which a ſeparate maintenance has been ſecured to the wife, or in which the huſband has left the kingdom either with or without the power or intention of returning, and in which the wife has been held capable of ſuing and being ſued alone, I wiſh to know to what extent the principle goes on which they have proceeded: whether under ſuch circumſtances a married woman is to be conſidered as a *feme ſole* on a principle which ſtops ſhort at a matter of contract, or on a principle which goes to a greater extent and obliges us to conſider her as a *feme ſole* to all intents and purpoſes. Undoubtedly, the policy of the law which has conſidered a married woman as incapable of being called upon ſeparate from her huſband, admits of ſome modifications ariſing from particular circumſtances. When the huſband is baniſhed he is conſidered as civilly dead: but tranſportation

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has been adopted in *F. N. B.* 150. *F. Co. Litt.* 33. *b.* 132. *b.* *Perkins*, *Sect.* 307. *Hale's MSS. Co. Litt Book* 1. *Note* 205. *Ed.* 15. and *Gilbert. Treat. on Dower in Law of Uſes*, 401. The reaſon aſſigned in moſt of theſe books is, that the wife, by withholding her conſent, might prevent her huſband from becoming profeſſed: Lord Chief Baron *Gilbert* treats profeſſion as a ſeparation, not a diſſolution of the marriage, and obſerves, that although the eccleſiaſtical law gave alimony during the life of the huſband, yet ſhe could have no ſeparate intereſt by way of dower while the marriage continued. Sir *Edward Coke*, indeed, (1 *Inſt.* 33. *b.*) goes ſo far as to lay it down generally, that dower ariſes on the natural, not on the civil death of the huſband. This *dictum*, however, he no otherwiſe ſupports than by inſtancing the caſe of profeſſion, which exception, if well founded, ſeems to proceed upon reaſons not altogether applicable to the caſes of abjuration and exile. With reſpect to abjuration for felony, though the dower of the wife was originally forfeited by the attainder with which it was attended, yet as the 1 *Ed.* 6. *c.* 12. removed that forfeiture, it ſhould ſeem that between that time and the 21 *Jac.* 1. *c.* 28. which aboliſhed the privilege of ſanctuary and conſequently put an end to abjuration altogether, the wife might have been entitled to dower on this civil death of the huſband. Suppoſing this to have been the caſe, the ſame conſequence would naturally enſue a tranſportation for life at the preſent day.

(*a*) So a jointreſs was entitled to her jointure upon the abjuration of her huſband, *Margery Weyland*'s caſe; ſo if the huſband aliened the land of the wife, and afterwards abjured the realm, ſhe might have had a *cui in vitâ*. *Co. Litt.* 133. *a.* But in the caſe of profeſſion, if the wife aliened the land which was in her own right, and then deraigned her huſband, he might enter and avoid the alienation. *Hil.* 33, *Ed.* 3. *Fitz. Ab.* tit. *Entrè congeable*, pl. 52. *Co. Litt.* 132. *b.*

for a term of years may give riſe to many difficulties with reſpect to the enjoyment of the huſband's eſtate, both real and perſonal. But beſides the difficulties which might ariſe during the term of the tranſportation, another difficulty of equal importance occurs where the wife has contracted debts after the period of her huſband's tranſportation has elapſed, but before his actual return to this country. The caſe before us muſt be decided on ſome principle which will govern ſuch a caſe as that. Though the caſe of *Sparrow* v. *Carruthers* was decided by Mr. Juſtice *Yates*, (a name that will be illuſtrious as long as the law of *England* remains,) yet as far as his opinion can be collected, he ſeems to have treated it as a material circumſtance in evidence, that the time of the tranſportation was not out; and he does not give any opinion as to what would have been the ſituation of the parties if it had been out. We cannot preſume to ſay how he would have decided had the huſband continued to reſide abroad after the period of his tranſportation had expired, or had only remained there to collect his affairs with a view to return to this country when he had ſo done.

Heath J. There is a great difference between the caſes of an *Engliſhman* reſiding abroad, leaving his wife in this country, and of a foreigner ſo doing. The former may be compelled to return at any time by the King's privy ſeal; but in the old caſes of baniſhment and abjuration, as well as in the more modern one of tranſportation, the huſband could not return, as it would have been contrary to law. There is no caſe in which the wife has been held liable, the huſband being an *Engliſhman*.

As the caſe of *Marſhall* v. *Mary Rutton*, 8 *T. R.* 545. in which it was expected that the whole doctrine reſpecting the liability of a *feme covert* to be ſued would be fully diſcuſſed, was then pending before the twelve judges, the Court deſired that this caſe might ſtand over until that had been determined.

And on this day Lord *Eldon* Ch. J. ſaid, that after all the diſcuſſion which the doctrine had undergone, the Court could ſee nothing to induce them to think that the direction given to the jury in this caſe was wrong.

Per Curiam, Rule diſcharged.

June 25th.

FAIL *v.* PICKFORD.

In *aſſumpſit* againſt a carrier for goods ſpoiled, the Defendant was not allowed to pay the invoice price into Court.

THIS was an action of *aſſumpſit* brought againſt the Defendant as a carrier to recover the loſs ſuſtained upon a quantity of tea, which had been put on board the Defendant's barge to be carried from *London* to *Liverpool*, and which had been ſpoiled in conſequence of the barge being ſunk. The Defendant offered to pay for the damaged tea at the invoice price: the Plaintiff contended that he was entitled to more than the invoice price, on account of an alteration reſpecting the allowance of trett adopted by the *Eaſt India* Company ſince the invoice was made out.

Shepherd Serjt. now moved on the part of the Defendant, that he might be allowed to pay the invoice price into Court. He contended that as the Defendant admitted that a ſpecific ſum was due, and the only queſtion between the parties was, Whether he were liable to any thing *ultrà* that ſum or not? The Plaintiff ought not to be allowed to litigate that queſtion without the riſk of being ſubject to coſts in caſe of failure. He relied on *Hutton et Ux.* v. *Bolton*, 1 *H. Bl.* 299. *in notis*, where in an action againſt a carrier who had advertiſed that he would not be liable beyond 20 *l.* unleſs paid for in proportion to the riſk, he was permitted to pay the 20 *l.* into Court: and he ſaid that the preſent caſe was not an action on a mere tort like *Bowles* v. *Fuller*, 7 *T. R.* 335. and *Salt* v. *Salt*, 8 *T. R.* 47. but was *quaſi ex contractu*.

Lens Serjt. ſhewed cauſe in the firſt inſtance, and inſiſted that the Plaintiff's demand in this caſe was for damages altogether uncertain; that no part of that demand was diſtinguiſhable from the reſt; that the rule eſtabliſhed by the caſe of *Hallet* and others v. the *Eaſt India* Company, 2 *Burr.* 1120. was, "that where the "ſum demanded is a ſum certain, or capable of being aſcertained "by mere computation without leaving any other ſort of diſcre-"tion to be exerciſed by the jury, it is right and reaſonable to "admit the Defendant to pay money into Court;" and that the ſame principle was adopted in *Hutton et Ux.* v. *Bolton*, for the Court there held that the demand was ſubſtantially for a ſpecific ſum. But in the preſent caſe, he ſaid, the Plaintiff demanded an adequate compenſation for the injury ſuſtained, which compenſation was to be aſcertained by the jury; and though the Defendant admitted a particular mode of eſtimating that compenſation, and offered to pay a ſum of money calculated accordingly, yet that ſum of money formed no part of the Plaintiff's demand, which was for a compenſation to be calculated according to ſuch mode as the jury ſhould adopt. He alſo referred to the caſes of *Bowles* v. *Fuller* and *Salt* v. *Salt*, the former of which was an action againſt the ſheriff for a falſe return, and the latter an action for dilapidations, in both of which it was held that money could not be paid into Court.

Heath J. (*abſente* Lord *Eldon* Ch. J.) If we could find any principle upon which this application could be allowed, we ſhould be very well inclined to grant it. But the Courts have not gone ſo far as to allow money to be paid in, in caſes of uncertain damages. Where there is any contract between the parties upon which the Court can reſt, it may be done: but in this caſe there is no ſuch contract. Suppoſe an action on the caſe were brought for negligently driving a carriage, in conſequence of which the Plaintiff's leg was broken, could the Defendant pay into Court the amount of the ſurgeon's bill?

Rooke and *Chambre* Js. expreſſed a ſtrong deſire to accede to the application, but obſerved that it could not be done without violating the principle which had been eſtabliſhed as the rule upon this ſubject.

Shepherd took nothing by his motion (*a*).

Pinero *v.* Wright.

June 25th.

A *capias ad reſpond.* againſt bail was *teſte'd* of a day prior to the return of the *ca. ſa.* againſt the principal, but was not in fact ſued out till afterwards. Held regular.

Shepherd Serjt. moved to ſet aſide the *capias ad reſpondendum*, which had iſſued againſt the Defendant as bail, for irregularity. The ſuppoſed irregularity was, that the *capias ad reſpondendum* againſt the Defendant was *teſte'd* of a day preceding that on which the *capias ad ſatisfaciendum* againſt the principal was returned. He contended that as the bail are not liable to be ſued until the *capias ad ſatisfaciendum* has been returned, it appeared upon the very face of the proceſs in this caſe that it had been ſued out too ſoon.

Bayley Serjt. ſtated, that in point of fact the *capias ad reſpondendum* did not iſſue until after the *capias ad ſatisfaciendum* had been

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(*a*) "The true grounds on which rules for payment of money into Court are granted, are accurately ſtated in *Tidd's Pract.* 408. ed. 1. 537. ed. 2." *Per Groſe* J. 8 *T. R.* 49.

1800.

Pinero
v.
Wright.

been returned, and that the circumſtance of its being *teſte'd* of a day anterior to that time was not material, ſince the Plaintiff was at liberty to ſhew the time when it really iſſued.

The Court (*abſente* Lord *Eldon* Ch. J.) ſaid, that no inconſiſtency would appear on the record (*a*), and that there was no irregularity in the Plaintiff's proceeding.

Shepherd took nothing by his motion.

(*a*) Vide *Davis* v. *Owen*, *ante*, vol. 1. p. 343.

June 25th.

Maria *v.* Hall.

The Court will not compel a priſoner of war who ſues for wages earned on board an *Engliſh* ſhip, to give ſecurity for coſts.

Shepherd Serjt. moved for a rule to ſhew cauſe why the proceedings in this caſe ſhould not be ſtayed until the Defendant ſhould give ſecurity for coſts. The Plaintiff was a *French* priſoner of war confined in the priſon at *Liverpool*, and had brought this action againſt the Defendant as maſter of a ſhip, to recover a compenſation for working the ſhip home from the *Weſt Indies*. He contended that the caſe of a priſoner of war was different from the common caſe of a foreigner reſident in this country (*a*).

But Heath J. obſerved, that it had been determined that a priſoner of war may maintain an action on a contract for wages (*b*).

And *the Court* (*abſente* Lord *Eldon* Ch. J.) rejected the application.

Shepherd took nothing by his motion.

(*a*) *Vide Porrier* v. *Carter*, 1 *H. Bl.* 106.

(*b*) *Sparenburgh* v. *Bannatyne*, *ante*, vol. 1. p. 163. Indeed the Court having determined in *Henſchen* v. *Garves*, 2 *H. Bl.* 383. and *Jacobs* v. *Stevenſon*, *ante*, vol. 1. p. 96. that a foreigner ſerving on board an *Engliſh* ſhip is not compellable to give ſecurity for coſts, and in *Sparenburgh* v. *Bannatyne*, that a priſoner of war may maintain an action for wages, there ſeems to have been leſs reaſon for calling upon the preſent Plaintiff to give ſecurity who was actually within the kingdom, than on any foreign ſeaman ſerving out of the kingdom on board an *Engliſh* ſhip.

ANDERSON Adminiſtrator, &c. *v.* MAY.

June 28th.

A copy of an attorney's bill, the original of which has been delivered to the Defendant, may be admitted in evidence without proof of notice to produce the original: and is concluſive as to the reaſonableneſs of the items.

THIS action was brought for buſineſs done as an attorney by the Plaintiff's inteſtate at the inſtance of the Defendant. At the *Weſtminſter* ſittings in this term the cauſe was tried before Lord *Eldon* Ch. J. when in order to prove the amount of the bill, the Plaintiff gave in evidence a copy of a bill delivered to the Defendant in 1796, and which had never been referred for taxation. The Defendant objected to this being received in evidence, inaſmuch as no notice had been given to produce the bill delivered to the Defendant. But his Lordſhip held that it ought to be received, and was concluſive as to the reaſonableneſs of the charges (*a*), it being the Defendant's own fault that the bill had never been taxed. A verdict was accordingly found for the Plaintiff, and the point made by the Defendant reſerved for the opinion of the Court.

Heywood Serjt. now moved to ſet aſide the verdict and have a new trial, contending that the rule was clear that no copy can be received in evidence until a notice has been given to produce the original; that this caſe was diſtinguiſhable from *Jory* v. *Orchard* (*b*), becauſe here the bill was not delivered by way of notice of action, but in the uſual way only, as a demand of ſo much money due; that the Court in the above caſe relied on the circumſtance of the paper read in evidence being a duplicate original, and referred to the analogous caſe of a notice to quit, a copy of which is uſually received; whereas that practice, he obſerved, was not founded on any authority and was contrary to principle.

But *The Court* ſaid, that it was the conſtant practice to receive a copy of this kind in evidence, and obſerved, that it was not a ſtronger caſe than *Jory* v. *Orchard*.

Heywood took nothing by his motion.

(*a*) Vide *Loveridge* v. *Botham*, *ante*, vol. 1. p. 49. alſo *Knox* v. *Whalley*, *Eſp. N. P. Caſ.* 159.

(*b*) *Ante*, p. 39.

June 28th.

SAUNDERSON *v.* JACKSON and Another.

A bill of parcels in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, ſeems to be a ſufficient memorandum of the contract within the ſtatute of frauds. At all events, a ſubſequent letter written and ſigned by the vendor referring to the order, may be connected with the bill of parcels, ſo as to take the caſe out of the ſtatute.

THIS was an action on the caſe againſt the Defendants for not delivering 1000 gallons of gin to the Plaintiff within a certain time, according to a bargain entered into between them. There was a ſecond count for not delivering within a reaſonable time.

The cauſe was tried before Lord *Eldon* Ch. J. at the *Guildhall* ſittings after laſt *Eaſter* term, when the contract for the delivery of the gin having been proved on the part of the Plaintiff, the Defendants inſiſted that the caſe was within the ſtatute of frauds, inaſmuch as there was no note or memorandum in writing of the bargain. The circumſtances were as follow: At the time the order for the gin was given by the Plaintiff to the Defendants, a bill of parcels was delivered to the former, the printed part of which was, "*London.* Bought of *Jackſon* and *Hankin*, diſtillers, No. 8, *Oxford-ſtreet*," and then followed in writing, "1000 gallons of gin, 1 in 5. gin 7ſ. 350*l*." About a month after the above period the Defendants alſo wrote the following letter to the Plaintiff: "Sir, we wiſh to know what time we ſhall ſend you a part of your order, and ſhall be obliged for a little time in delivery of the remainder; muſt requeſt you to return our pipes. We are, your humble ſervants, *Jackſon* and *Hankin*."

On this evidence his Lordſhip directed the jury to find a verdict for the Plaintiff, reſerving the point made for the conſideration of the Court.

Accordingly *Lens* Serjt. having on a former day obtained a rule *niſi* for ſetting aſide this verdict and entering a nonſuit, he was now called upon to begin in ſupport of his rule. He obſerved that the words of the 29 *Car.* 2. *c.* 3. *ſ.* 17. require that "ſome note or memorandum in writing of the bargain be made and ſigned by the parties to be charged by ſuch contract, or their agents thereunto lawfully authoriſed;" and that in *Hawkins* v. *Holmes*, 1 *P. Wms.* 770. and *Stokes* v. *Moore*, *ib.* in the notes by Mr. *Cox*, the Court had held a ſigning by the party neceſſary, though the draught of the conveyance had in the former caſe been altered in the hand-writing of the purchaſer, and in the latter, Saunderson v. Jackson and Another.

latter, the ſeller had himſelf written inſtructions for the renewal of a leaſe. He contended, that though the printed name contained in the bill of parcels might have amounted to a ſignature within the meaning of the act, if the bill of parcels had been intended to expreſs the contract *quaſi* a contract, yet that in this caſe it had not been delivered to the Plaintiff with that view; that the contract itſelf had never been reduced to writing or ever was intended to be ſo; and therefore the bill of parcels could only operate as evidence of a contract previouſly entered into; and that the ſubſequent letter of the Defendants, though ſigned by them, could not be treated as a note or memorandum of the contract, being accidental and only a reference to a pre-exiſting contract.

Shepherd Serjt. *contrà* was ſtopped by the Court.

Lord Eldon Ch. J. This bill of parcels, though not the contract itſelf, may amount to a note or memorandum of the contract within the meaning of the ſtatute. The ſingle queſtion therefore is, Whether if a man be in the habit of printing inſtead of writing his name, he may not be ſaid to ſign by his printed name as well as his written name? At all events, connecting this bill of parcels with the ſubſequent letter of the Defendants, I think the caſe is clearly taken out of the ſtatute of frauds. For although it be admitted that the letter which does not ſtate the terms of the agreement would not alone have been ſufficient, yet as the jury have connected it with ſomething which does, and the letter is ſigned by the Defendants, there is then a written note or memorandum of the order which was originally given by the Plaintiff ſigned by the Defendants. It has been decided (*a*) that if a man draw up an agreement in his own handwriting, beginning "I *A. B.* agree, &c." and leave a place for a ſignature at the bottom, but never ſign it, it may be conſidered as a note or memorandum in writing within the ſtatute. And yet it is impoſſible not to ſee that the inſertion of the name at the beginning was not intended to be a ſignature, and that the paper was meant to be incomplete until it was further ſigned. This laſt caſe is ſtronger than the one now before us, and affords an anſwer to the argument that this bill of parcels was not delivered *as* a note or memorandum of the contract.

Per Curiam, Rule diſcharged.

(*a*) *Knight* v. *Cuckford*. *Eſp. N. P. Caſ.* 190. So it has been held that if a will of lands begin "I *John Stanley* make this my "laſt will, &c." it need not be otherwiſe ſigned to make it valid within the ſtatute of frauds. *Lemayne* v. *Stanley*, 3 *Lev.* 1.

1800.

June 28th.

PAGE *v.* FRY.

In a declaration on a policy of inſurance the Plaintiff averred that Meſſrs. *H.* at the time of effecting the policy and at the time of the loſs, were intereſted in the cargo which was the ſubject of the inſurance "to a large amount, to wit, to the amount of all the money ever inſured thereon;" at the trial it appeared that previous to effecting the policy, Meſſrs. *H.* had admitted another mercantile houſe to a joint concern in the cargo inſured. Held that the averment was ſupported by the evidence.

THIS was an action on a policy of inſurance on the ſhip *Margaret* and a cargo of corn, at and from *Dundee* to *Chicheſter*, effected by the Plaintiff as agent of Meſſrs. *Hyde* and *Hobbs*. In the declaration it was averred, "that certain perſons uſing trade and commerce under the ſtyle and firm of Meſſrs. *Hyde* and *Hobbs*, were at the time of loading the ſaid corn on board the ſaid ſhip as aforeſaid and at the time of ſubſcribing the ſaid writing or policy of inſurance, and from thenceforth until the time of the loſs hereinafter mentioned intereſted in the ſaid corn *to a large amount, to wit, to the amount of all the money ever inſured thereon*, and that the ſaid writing or policy of aſſurance ſo made in the name of the Plaintiff, was made to and for the uſe, riſk, benefit, and account of them the ſaid Meſſrs. *Hyde* and *Hobbs*, to wit, at, *&c.*"

At the trial before Lord *Eldon* Ch. J. at the *Guildhall* ſittings after laſt *Eaſter* term, it appeared in evidence that Meſſrs. *Hyde* and *Hobbs* who were merchants at *Chicheſter*, had, through the agency of the Plaintiff, purchaſed a certain quantity of corn on their own account; that on the 27th of *December* 1798, they informed the Plaintiff by letter, that thinking the engagement might perhaps be too large for themſelves, they had offered another houſe of the name of *Hacks* a joint concern in the corn, which the latter had accepted; and at the ſame time directed the Plaintiff to effect an inſurance on the cargo, which he accordingly did on the 28th *January* 1799. The invoices were made out to *Hyde* and *Hobbs*, and payment for the cargo was made by them. It was objected on the part of the Defendant, that the evidence contradicted the averment in the declaration, that the whole intereſt in the cargo inſured was in Meſſrs. *Hyde* and *Hobbs*. His Lordſhip directed the jury to find a verdict for the Plaintiff, but gave leave to the Defendant to move for a nonſuit.

Accordingly a rule *niſi* for that purpoſe having been obtained upon a former day;

Lens Serjt. now ſhewed cauſe. The whole queſtion in this caſe is, Whether the variance between the averment of intereſt in the decla-

ration

ration and the intereſt proved be material? Under the 19 *Geo.* 2. *c.* 37. it is undoubtedly neceſſary that the party for whom the policy is effected ſhould be really intereſted, and it has been the practice ſince that ſtatute to aver the intereſt. It ſeems however to be doubtful whether it be neceſſary ſo to do: the effect of the ſtatute is not to make any additional averment in the declaration neceſſary, but only to throw upon the Plaintiff the burthen of proving that the parties for whoſe benefit the policy is made are intereſted within the meaning of the ſtatute. In this caſe the objection is not that Meſſrs. *Hyde* and *Hobbs* are not intereſted, but that their intereſt is not properly averred. If then the averment in queſtion were unneceſſary, it will not prevent the Plaintiff from recovering, being alleged under a *ſcilicet;* for as it does not relate to matters that are part of the contract, it is not to be conſidered as a material averment (*a*). At any rate this averment need not be conſtrued ſo ſtrictly as to exclude the intereſt of all other perſons beſides Meſſrs. *Hyde* and *Hobbs*. The ſubſtantial part of the averment is, that Meſſrs. *Hyde* and *Hobbs* were intereſted to a large amount, and indeed the other party who was partly intereſted with them had only an equitable claim on the proceeds. The *primâ facie* intereſt is in thoſe perſons who paid for the cargo. In *Page* v. *Rogers*, *Park. Inſur.* 402. it was averred that the Plaintiff was poſſeſſed of one-third of the ſhip inſured, and it appearing that he had at one time purchaſed the whole ſhip, it was objected that as there was no evidence of his having ſince parted with two-thirds, the allegation was not made out; but Lord *Mansfield* over-ruled the objection.

Shepherd and *Beſt* Serjts. *contrà.* Whether under the 19 *Geo.* 2. it be neceſſary to aver the Plaintiff's intereſt, is not the queſtion here; but the objection is, that the Plaintiff has ſtated upon the record that an intereſt exiſts in certain perſons in whom it is not, and that having ſo ſtated it upon record, he ought to have proved it. The true way of determining whether an unneceſſary averment need be proved, is to conſider whether if referred to the Prothonotary it could be ſtruck out as impertinent. *Briſtow* v. *Wright*, *Doug.* 667. In *Hare* v. *Cater*, *Cowp.* 766. where it was averred that the Defendant was aſſignee of all the premiſes, and it turned out that he was aſſignee of a part only, the variance was held fatal. Now the neceſſary conſtruction of this averment is, that the excluſive intereſt was in Meſſrs. *Hyde* and *Hobbs*. It

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(*a*) *Frith* v. *Gray*, cit. in the note to *Drewry* v. *Twiſs*, 4 *T. R.* 561. and *Peppin* v. *Solomon*, 5 *T. R.* 496.

June 28th.

Page *v.* Fry.

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This was an action on a policy of inſurance on the ſhip *Margaret* and a cargo of corn, at and from *Dundee* to *Chicheſter*, effected by the Plaintiff as agent of Meſſrs. *Hyde* and *Hobbs*. In the declaration it was averred, "that certain perſons uſing trade and commerce under the ſtyle and firm of Meſſrs. *Hyde* and *Hobbs*, were at the time of loading the ſaid corn on board the ſaid ſhip as aforeſaid and at the time of ſubſcribing the ſaid writing or policy of inſurance, and from thenceforth until the time of the loſs hereinafter mentioned intereſted in the ſaid corn *to a large amount, to wit, to the amount of all the money ever inſured thereon*, and that the ſaid writing or policy of aſſurance ſo made in the name of the Plaintiff, was made to and for the uſe, riſk, benefit, and account of them the ſaid Meſſrs. *Hyde* and *Hobbs*, to wit, at, *&c.*"

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Accordingly a rule *niſi* for that purpoſe having been obtained upon a former day;

Lens Serjt. now ſhewed cauſe. The whole queſtion in this caſe is, Whether the variance between the averment of intereſt in the declaration

ration and the intereſt proved be material? Under the 19 *Geo.* 2. *c.* 37. it is undoubtedly neceſſary that the party for whom the policy is effected ſhould be really intereſted, and it has been the practice ſince that ſtatute to aver the intereſt. It ſeems however to be doubtful whether it be neceſſary ſo to do: the effect of the ſtatute is not to make any additional averment in the declaration neceſſary, but only to throw upon the Plaintiff the burthen of proving that the parties for whoſe benefit the policy is made are intereſted within the meaning of the ſtatute. In this caſe the objection is not that Meſſrs. *Hyde* and *Hobbs* are not intereſted, but that their intereſt is not properly averred. If then the averment in queſtion were unneceſſary, it will not prevent the Plaintiff from recovering, being alleged under a *ſcilicet;* for as it does not relate to matters that are part of the contract, it is not to be conſidered as a material averment (*a*). At any rate this averment need not be conſtrued ſo ſtrictly as to exclude the intereſt of all other perſons beſides Meſſrs. *Hyde* and *Hobbs*. The ſubſtantial part of the averment is, that Meſſrs. *Hyde* and *Hobbs* were intereſted to a large amount, and indeed the other party who was partly intereſted with them had only an equitable claim on the proceeds. The *primâ facie* intereſt is in thoſe perſons who paid for the cargo. In *Page* v. *Rogers*, *Park. Inſur.* 402. it was averred that the Plaintiff was poſſeſſed of one-third of the ſhip inſured, and it appearing that he had at one time purchaſed the whole ſhip, it was objected that as there was no evidence of his having ſince parted with two-thirds, the allegation was not made out; but Lord *Mansfield* over-ruled the objection.

Shepherd and *Beſt* Serjts. *contrà*. Whether under the 19 *Geo.* 2. it be neceſſary to aver the Plaintiff's intereſt, is not the queſtion here; but the objection is, that the Plaintiff has ſtated upon the record that an intereſt exiſts in certain perſons in whom it is not, and that having ſo ſtated it upon record, he ought to have proved it. The true way of determining whether an unneceſſary averment need be proved, is to conſider whether if referred to the Prothonotary it could be ſtruck out as impertinent. *Briſtow* v. *Wright*, *Doug.* 667. In *Hare* v. *Cater*, *Cowp.* 766. where it was averred that the Defendant was aſſignee of all the premiſes, and it turned out that he was aſſignee of a part only, the variance was held fatal. Now the neceſſary conſtruction of this averment is, that the excluſive intereſt was in Meſſrs. *Hyde* and *Hobbs*. It

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can make no difference in the caſe whether Meſſrs. *Hyde* and *Hobbs* purchaſed the cargo in their own name for others, or having purchaſed it on their own account they afterwards admitted others to a joint concern in it; now in the former caſe it is clear that if intereſt were averred to be in themſelves, the variance would be fatal. The parties whom they admitted into the concern may be conſidered as partners in the tranſaction; they might have inſured their proportion as ſuch, and might have averred their intereſt in that proportion. The averment of the Plaintiff therefore which excludes the intereſt of any perſon except Meſſrs. *Hyde* and *Hobbs* is untrue (*a*).

Lord Eldon Ch. J. The queſtion is, Whether Meſſrs. *Hyde* and *Hobbs* had ſuch an intereſt in the whole cargo as will ſupport the averment in queſtion? An inſurable intereſt is a very different intereſt from moſt others that can be ſtated. In *Le Cras* v. *Hughes* (*b*) it is very certain that the party inſured had no intereſt in the ſubject of the inſurance according to the common underſtanding of the word intereſt; for the prize taken not coming within the terms of the act of Parliament, and conſequently not within the terms of the proclamation, was completely at the diſpoſal of the crown. In that caſe, as counſel for the Defendant, I preſſed upon Lord *Mansfield* the authority of a caſe before Lord *Bathurſt* aſſiſted by Sir *Thomas Sewell*, where the next of kin of a lunatic applied to the Court of Chancery praying that the evidence of his being the next of kin might be perpetuated, and ſtating that he had ſuch an intereſt in the eſtate as the Court might take notice of (*c*). The application however was rejected on the ground of want of intereſt; and yet the intereſt in that caſe would generally be underſtood to be much more certain than that reaſonable expectation on which *Le Cras* v. *Hughes* was decided. So in the caſe of the *Dutch* commiſſioners (*d*) which was lately decided, it is very difficult to define what their intereſt was, and yet they were held to have an inſurable intereſt. My opinion therefore upon this caſe is very clear; I think the Plaintiff had a ſufficient intereſt throughout the intirety of this cargo, notwithſtanding other perſons had a beneficial intereſt in a part, to ſupport the averment in this declaration.

(*a*) See *Perchard* v. *Whitmore*, *ante*, p. 155. *in notis*, where it ſeems to have been taken for granted, that if a third perſon had been intereſted in the goods jointly with the two co-plaintiffs at the time of effecting the policy, the Plaintiffs muſt have been nonſuited.

(*b*) *Park. Inſur.* 269.

(*c*) In *Sackvill* v. *Aylewortb*, at the houſe of Lord Chan. *Nottingham coram Charleton* J. the deviſee of a lunatic, under a will made previous to the lunacy, having brought a bill againſt the heir at law to examine witneſſes touching the will, *in perpetuam rei memoriam*, the bill was diſmiſſed. 1 *Vern.* 106.

(*d*) *Crawford* v. *Hunter*, 8 *T. R.* 13.

PAGE *v.* FRY.

HEATH J. I do not ſee why a joint-tenant or a tenant in common has not ſuch an intereſt in the intirety as will entitle him to inſure. A policy made by a perſon ſo intereſted is not to be conſidered as a wager policy.

ROOKE J.—I think that Meſſrs. *Hyde* and *Hobbs* had ſuch an intereſt in the cargo as will anſwer the terms of the averment.

CHAMBRE J.—The averment in ſubſtance is nothing more than that the parties for whoſe benefit the inſurance was made, had an intereſt in the ſubject of that inſurance. They are not bound by the terms of the averment to ſhew any thing more than that they have an intereſt, and if they ſhew an intereſt to the extent of one hundredth part of the cargo it will be ſufficient. The ſpirit of the 19 *G.* 2. only requires that the policy ſhall not be a gaming policy.

Rule diſcharged.

HOLLAND *v.* HOPKINS.

June 30th.

If a bill of particulars ſtate the Plaintiff's demand to be for goods ſo'd and delivered to the Defendant, no evidence can be received of goods ſold by the Defendant as agent for the Plaintiff.

INDEBITATUS aſſumpſit "for certain horſes mares and geldings before that time ſold and delivered by the Plaintiff to the Defendant." There was alſo a count on a *quantum meruit*, and counts for money lent, paid, had, and received, and on an account ſtated. Plea *Non aſſumpſit.*

The cauſe was tried before Lord *Eldon* Ch. J. at the *Weſtminſter* ſittings after laſt *Eaſter* term, when it appeared that the Plaintiff was a horſe-dealer living in the country, and the Defendant a ſtable-keeper in *London;* that there had been conſiderable dealings between them, and on an account being taken a balance was found due to the former for horſes ſold up to the 11th of *September* 1797 by the Defendant as agent and broker to the Plaintiff; that on or about that day the Defendant received other horſes from the Plaintiff, which he afterwards ſold in the ſame character, and received the money for them; that on this action being commenced, a bill of particulars was obtained, which ſtated the Plaintiff's demand to conſiſt of two *items*, firſt for money owing on an account ſettled and balanced for horſes ſold and delivered before the 11th of *September* 1797; ſecondly, for horſes ſold and delivered by the Plaintiff and his ſervants to the Defendant on or about the 11th of *September* 1797; that the Defendant had paid money into court generally, and in ſo doing had paid a few pounds more than was ſufficient to ſatisfy what remained due upon the account balanced. It was objected by the Defendant, that the ſecond *item* of the bill of particulars having ſtated

1800.

HOLLAND *v.* HOPKINS.

ſtated the Plaintiff's demand to be for horſes ſold and delivered to the Defendant, no evidence ought to be received of a ſale by the Defendant in the character of agent or broker for the Plaintiff, ſo as to entitle the latter to recover under the count for money had received. To this it was anſwered, firſt that the Plaintiff by his bill of particulars was only confined to the tranſaction reſpecting the horſes delivered to the Defendant on or about the 11th of *September* 1797, and that he was at liberty to make any claim ariſing out of that tranſaction; and ſecondly, that as the Defendant had paid money into court generally the Plaintiff was at liberty to apply that money to the count for money had and received, and take a verdict for the remainder of his demand under the account ſtated. But his Lordſhip being of opinion againſt the Plaintiffs on both points, directed a nonſuit, ſubject to the opinion of the Court.

Accordingly a rule *Niſi* for ſetting aſide this nonſuit having been obtained on a former day,

Bayley and *Beſt* Serjts. now ſhewed cauſe, and contended, 1ſt, that independent of the circumſtance of money being paid into Court, the Plaintiff was clearly precluded from going into evidence of a ſale by the Defendant as his agent, ſince if it were otherwiſe a bill of particulars would afford the means of ſurprize upon the Defendant, inſtead of giving him notice of the caſe which he is to defend; that if the evidence offered by the Plaintiff were to be received merely becauſe it related to the horſes ſtated in the bill of particulars, it would be very difficult to draw any line; and that the Plaintiff could not ſuffer by being confined ſtrictly to his bill of particulars, ſince if he wiſhed to make a demand in the alternative he might have an opportunity of doing ſo, by ſtating his demand alternatively in the bill of particulars: 2dly, That if the Plaintiff were precluded by the bill of particulars from giving evidence of the tranſaction relative to the horſes, he could not be at liberty to apply the money paid into court to the ſatisfaction of the demand ariſing out of that tranſaction; for though the Defendant by paying money into court generally had admitted the contract ſtated in the count for money had and received as well as in the other counts, yet the Plaintiff was under the neceſſity of ſhewing the amount due to him upon that contract to be equal to the ſum paid in, from doing which he had precluded himſelf in this caſe.

Cockell and *Shepherd* Serjts. *contrà*, inſiſted, that by the bill of particulars they were merely confined to the tranſaction relative to the horſes in queſtion; that the object of a bill of particulars is to prevent the Defendant from being ſurpriſed, by informing him of the ſubject of the Plaintiff's demand, and that if a Plaintiff is prevented from going into evidence to ſupport the different counts of his declaration by the wording of his bill of particulars, it will become neceſſary for him to vary the wording of his bill of particulars with as much nicety as his declaration.

Lord ELDON Ch. J.—We are of opinion, that under the circumſtances of this caſe this bill of particulars is not ſufficiently large to let in the evidence which the Plaintiff wiſhed to introduce. The declaration contained counts for horſes ſold and delivered, for money had and received, and on an account ſtated. It is very clear that the count for money had and received is calculated to embrace the tranſaction of the ſale of horſes on the Plaintiff's account, and to entitle him to recover the proceeds of that ſale. But the defendant having applied to the Plaintiff to ſtate the particulars of his demand, the latter informs him that it is of two ſorts; 1ſt, For a balance on an account ſtated between them, and 2dly, For the price of horſes ſold and delivered. In conſequence of this explanation the Defendant pays into court a certain ſum which he acknowledges to be due upon the account ſtated, and conſidering that the reſt of the declaration conſiſts of a demand for the price of horſes ſold by him on account of the Plaintiff and a demand for horſes ſold by the Plaintiff to himſelf, the the former of which is abandoned by the terms of the bill of particulars, he comes prepared to ſay at the trial that he owes the Plaintiff nothing on his latter demand only. Will he not then be ſurpriſed if the Plaintiff ſhould be permitted to give evidence applicable to that demand which ſeemed to have been abandoned? To me it appears, that a contract to repay money received on a ſale of horſes by commiſſion, is as different from a contract for the abſolute ſale of horſes to the Defendant, as a contract for the feed of the horſes would be. It has been contended, that this deciſion will introduce great nicety into bills of particulars; but I think it would be ſufficient for the bill of particulars to have ſtated, that on the 11th of *September* the horſes in queſtion were ſent to the Defendant, and that the Plaintiff demanded the value of them or ſo much as they ſold for. With reſpect to the payment of money into court, as the Defendant has admitted a balance to be due againſt himſelf, and no evidence was given applicable to the count for horſes ſold and delivered, he muſt be taken to have paid the money in on the account ſtated. On theſe grounds we think the nonſuit right.

The Court however gave the Plaintiff leave to amend his bill of particulars and go to a new trial on payment of the coſts ſubſequent to the time of the money paid into court.

1800.

June 30th.

Allingham *v.* Flower and Another, Sheriffs of *London*.

If after the commencement of an action of eſcape againſt the ſheriff for not taking a bail bond, good bail be put in and juſtified in the room of bail before put in who by the practice of the Court were a mere nullity, the Plaintiff cannot recover.

THE Plaintiff having commenced an action againſt one *John Blower*, by *capias ad reſpondendum*, returnable in eight days of *Saint Hilary*, *Blower* on the 24th of *January* put in bail, but one of them being clerk to *Blower*'s attorney, the Plaintiff treated the bail as a nullity and demanded an aſſignment of the bail-bond. Finding however that no bail-bond had been taken, and that *Blower* had been ſuffered to go at large upon the undertaking of his attorney, the Plaintiff on the 5th of *March* brought an action againſt the preſent Defendant for an eſcape; after the commencement of which action, *viz.* on the 30th of *April* one new bail was added in the original action inſtead of the attorney's clerk, and juſtified together with the other.

Early in *Eaſter* Term a rule was obtained by *Beſt* Serjt. calling on the Plaintiff to ſhew cauſe why all proceedings in the action of eſcape ſhould not be ſet aſide for irregularity.

On ſhewing cauſe it was inſiſted by *Shepherd* Serjt. and admitted by *Beſt*, that there was no irregularity in the Plaintiff's proceedings; but it was agreed on both ſides, that the parties ſhould be bound by the opinion of the Court in this motion, reſpecting the propriety of the action.

Shepherd contended, that the bail originally put in were as no bail, *Fenton* v. *Ruggles*, *ante*, vol. 1. *p.* 356. (*a*); that the action of eſcape therefore was regularly commenced; and that being once regularly commmenced it could not be defeated by bail ſubſequently put in. He obſerved, that in the caſe of *Pariente* v. *Plumbtree*, *ante*, *p.* 35. the bail were put in before the action was actually commenced, and the only queſtion was, Whether the Plaintiff ſhould be at liberty to contend in an action of eſcape, that bail were not put in at the return of the writ, when they had been allowed according to the practice of the Court?

On the other hand it was urged by *Beſt*, that the queſtion now to be tried was purely a queſtion of practice depending on the rules eſtabliſhed by the Court reſpecting the allowance of bail, and was therefore improper to be tried in the form of an action. He relied on the caſe of *Pariente* v. *Plumbtree*, and *Murray* v. *Durand*, *Eſp. N. P. Caſ.* 87. there cited by Mr. Juſtice *Heath*, in which latter caſe the bail were not put in until after the action commenced.

(*a*) Vid. et. *Wallace* v. *Arrowſmith*, *ante*, *p.* 29.

Lord **Eldon** Ch. J. ſaid, that the preſent caſe certainly went further than *Pariente* v. *Plumbtree*, but obſerved that it ſeemed to have been the opinion of Mr. Juſtice *Buller* that the Court ought to endeavour to find ſome means of ſtopping proceedings of this kind in which queſtions of practice only were involved.

The Court having taken time to conſider of their opinion,

Lord **Eldon** Ch. J. on this day ſaid; In the caſe of *Murray* v. *Durand* the action of eſcape was brought before any bail had been put in, yet on the rule for the allowance of bail being produced at the trial, Lord *Kenyon* ſaid, "By the rule now produced it appears that the Defendant has ſatisfied the exigence of the writ; bail above having been put in, and having juſtified, that is now ſubſiſting bail, and muſt be taken *nunc pro tunc*." My Brother *Buller* went the ſame length in *Pariente* v. *Plumbtree*, and the doctrine in *Fuller* v. *Preſt*, 7 *Term Rep.* 109. ſeems to admit the principle.

Per Curiam, Rule abſolute.

(In the HOUSE OF LORDS.)

Moor *v.* Denn ex dem. Mellor; in Error.

July 1ſt.

A Writ of error having been brought to reverſe the judgment given in this caſe by the Court of *Exchequer Chamber*, (*vid. ante*, vol. 1. p. 558.) the Plaintiff in error prayed that the judgment of that Court might be reverſed, and the former judgment of the Court of *King's Bench* in his favour, (ſee 5 *Term Rep.* 558. and 6 *Term Rep.* 175.) affirmed, for the following among other **Reasons**:

A. after giving a life-eſtate in certain copyholds to *B.* deviſed as follows; "All the *reſt* of my lands tenements and *hereditaments* either freehold or copyhold, whatſoever and whereſoever; and alſo all my goods, &c *after payment of my juſt debts and funeral expences*, I give deviſe and bequeath the ſame unto my wife *S C.* Held that under this deviſe *S C.* took only an eſtate for life.

Becauſe there are no words in the will of *John Carr* which can paſs any more than an eſtate for life to *Siſſily Carr*, conſequently upon her death the eſtate of the Defendant in error ceaſed, and the premiſes in queſtion deſcended to the Plaintiff in error as the heir of *John Carr*.

Edward Law.
Geo. Wood.

The Defendant in error ſubmitted that the opinion and judgment of the Court of *Exchequer Chamber* were right and according to law, and that the ſame ought to be affirmed, and the original judgment

1800.
Moor v. Denn.

judgment of the Court of *King's Bench* reverſed for the following among other REASONS:

Firſt, Becauſe by the known and eſtabliſhed rules of law in the conſtruction of deviſes, the intention of the teſtator, as far as the ſame can be collected from the whole of his will, is to be carried into effect, although the words uſed by him in his will would not be ſufficient if uſed in a deed to paſs ſuch eſtate as it appears to have been his intention to deviſe.

II. Becauſe it was evidently the intention of the teſtator to give every thing abſolutely to his wife which he had a power to diſpoſe of, and which he had not before given to his kinſman *Nicholas Liſter*. This intention is manifeſt from the general words uſed by him in the reſiduary clauſe, which to a perſon unacquainted with the ſtrict rules of law muſt have appeared as comprehenſive as poſſible; which do paſs the abſolute property in the teſtator's perſonal eſtate, and muſt have been ſuppoſed by him to operate in the ſame manner on the real.

III. Becauſe it appears, that conſidering the ſaid *Siſſily Carr* as the great object of his bounty, and therefore beſt able to bear the burthen of paying his debts and funeral expences, the teſtator impoſed on her the duty of paying the ſame, as the condition annexed to the enjoyment of the property deviſed to her. In conſequence of which the ſaid *Siſſily Carr* either could not take the eſtate deviſed to her without diſcharging the teſtator's debts and funeral expences; or by accepting the ſame eſtate, became liable to the payment of thoſe debts and funeral expences; a burthen which, if ſhe only took an eſtate for her life in the premiſes deviſed to her, might by poſſibility have been greater than the benefit to be derived from ſuch deviſe; whereas the law always preſumes that by the deviſe of property the teſtator intends a benefit and not an injury to his deviſee.

IV. Becauſe the preſent caſe is not to be diſtinguiſhed in principle from the caſe of *Doe* on the demiſes of *Palmer* and others againſt *Richards*, 3 *Term Rep.* 356. in which it was held that a deviſee under a reſiduary bequeſt ſimilar in effect to the preſent took a fee-ſimple in the lands deviſed. The words in that will were, "All the reſt, reſidue, and remainder of my meſſuages, lands, tenements, hereditaments, goods, chattels, and perſonal eſtate whatſoever, my legacies and funeral expences being thereout paid, I give, deviſe, and bequeath unto my ſiſter *Jane Dewdney*; and do hereby conſtitute and appoint her whole and ſole executrix and reſiduary legatee of this my will." Every argument of intention drawn from the expreſſions which are uſed in that will ariſes alſo out of the will in queſtion, and may be applied at leaſt with equal force to the preſent caſe. No material diſtinction can be taken between the form of the charge found in that will, *viz.* "my legacies and funeral expences being thereout paid," and in the preſent, *viz.* "after payment of my juſt debts and funeral expences." In both caſes according to the ſtrict grammatical conſtruction, the payment of the charge ſhould precede the eſtate. The word "thereout," which is uſed in the charge of *Doe* v. *Palmer*, muſt be implied in the preſent caſe, and then it ought to bear the ſame conſtruction, or if ſome ſuch word is not to be implied, the payment of the debts and legacies muſt be a precedent condition to the deviſee's taking any eſtate, and the argument from it will be ſtill ſtronger, that ſhe takes a fee, as ſhe might otherwiſe pay more than ſhe would receive.

V. Gibbs.
Wm. Lamb.

This caſe was argued at the bar of the Houſe of Lords on the 27th of *June* by *Law* and *Wood* for the Plaintiffs in error, and by *Gibbs* and *Lamb* for the Defendants in error.

Macdonald Ch. B. on this day delivered the opinion of the judges, in ſubſtance as follows:—In offering to your Lordſhips the reaſons for the opinion which we have formed on this caſe, I ſhall avoid a minute examination of the great variety of caſes which bear on this ſubject: contenting myſelf after what your Lordſhips have already heard from the bar, with alluding to thoſe from which the principles on this ſubject are chiefly to be extracted, and with the application of thoſe principles to the preſent caſe.

The deviſe on which the queſtion ariſes means to give ſome intereſt in a real eſtate to the widow of the teſtator to the prejudice of the heir at law. What quantity of intereſt it was his intent to give as diſcloſed by the words which he has uſed is the queſtion for your Lordſhips' determination. One fundamental rule upon the conſtruction of the words of a will is, that thoſe words ought to have an apparent intent, and not be ambiguous or doubtful if the heir is thereby to be diſinherited. Another rule is, that the intention of the teſtator collected from the words he

1800.

Moore *v.* Denn.

he has uſed is to prevail, if it be not in contradiction to ſome eſtabliſhed rule of law. And in order to preſerve uniformity and conſequently ſecurity in adminiſtering the law of real property deviſed by will, it is neceſſary that the ſenſe which has been put upon particular modes of expreſſion ſhould be adhered to. If a deviſe of lands be to *A.* without words of limitation, an eſtate for life only ſhall paſs by that deviſe, yet from other proviſions and expreſſions an intent may be manifeſted which will ſupply the want of ſuch words. The words in the preſent caſe are, "Firſt I give and deviſe unto my kinſman *Nicholas Liſter* of *Creſwick Greave* in the pariſh of *Eccleſfield* yeoman all that my cuſtomary or copyhold meſſuage or tenement with the appurtenances ſituate and being in *Eccleſfield* aforeſaid, as the ſame is now in the tenure or occupation of *Valentine Sykes*; all the reſt of my lands tenements and hereditaments either freehold or copyhold whatſoever and wheresoever and alſo all my goods chattels and perſonal eſtate of what nature or kind ſoever after payment of my juſt debts and funeral expences I give deviſe and bequeath the ſame unto my loving wife *Siſſily Carr*, and I do hereby nominate and appoint her ſole executrix of this my laſt will and teſtament." The queſtion for your Lordſhips' determination will be, Whether according to the eſtabliſhed rules of conſtruing deviſes of this ſort an eſtate for life paſſes to the widow of the teſtator, or an eſtate in fee? It is clearly ſettled in a variety of caſes, that if one deviſe his eſtate to another, *paying his debts*, or *he paying his debts*, or, *paying a ſum in groſs*, a fee muſt neceſſarily paſs, becauſe as the deviſee is to pay the debts or money in all events, and his intereſt may ceaſe before he is repaid out of the eſtate if it be only an eſtate for life, he may be a loſer, which the teſtator cannot be ſuppoſed to have intended. The teſtator is therefore deemed to have deviſed an intereſt which will ſecure the payment of the debts or ſum in groſs by the deviſee without the hazard of loſs on his part. But if the teſtator direct the debts or ſum in groſs to be paid out of the profits of the land, then, inaſmuch as the land and not the deviſee is to bear the burden, no ground is laid for inferring that any greater quantity of intereſt was intended to be given than is preciſely expreſſed. So if an annual payment by the deviſee to another perſon be directed by the will to continue during the life of ſuch other perſon, as the deviſee may be a loſer if he do not ſurvive that perſon, an intent is from thence collected that he is to take a fee. The point to be conſidered then will be, Whether the words uſed in this will are materially diſtinguiſhable from thoſe uſed in other wills, and which have been held not to denote an intention ſo expreſſed by the deviſor as to enlarge that which would otherwiſe be an eſtate for life only into an eſtate in fee? This will depend upon the effect of the word "reſt," of the word "hereditaments," and of the proviſion "after payment of my juſt debts and funeral expences."

In the caſe of *Canning* v. *Canning*, *Moſely*, 240. the words uſed by the deviſor were, "all the reſt reſidue and remainder of my meſſuages lands tenements and hereditaments after my debts legacies and funeral expences are fully ſatisfied I give in truſt for my daughter:" the truſtees took but an eſtate for life. The authority of this caſe has been ſaid to be queſtionable by reaſon of the inaccuracy of many caſes in the book in which it is reported. But one of the learned judges has compared the caſe as reported with the regiſter's book, and it is found to be very correctly reported. It appears that the Court upon long debate declared that the words "reſt reſidue and remainder" being without words of limitation could not operate on the inheritance: this therefore ſeems a direct authority on this part of the caſe. In the preſent caſe the teſtator has given an eſtate to *N. Liſter*, which for want of words of limitation amounts only to an eſtate for life, and when he deviſes the *reſt* of his lands, *&c.* it would be too ſtrong a conſtruction of that relative word "reſt," after what had been determined in the caſes referred to, to ſuppoſe it to paſs all the intereſt he had in all other lands and the reverſionary intereſt in the lands before deviſed. The circumſtance therefore of this being a reſiduary deviſe does not ſeem ſufficient to enlarge that deviſe beyond the legal import of the words uſed in the will itſelf.

Nor do I conceive the word "hereditaments" will have that effect. The ſettled ſenſe of that word is to denote ſuch things as may be the ſubject matter of inheritance, but not the inheritance itſelf, and cannot therefore, by its own intrinſic force enlarge an eſtate, *primâ facie* a life eſtate into a fee (*a*). It may have weight under particular circumſtances in explaining the other expreſſions, from whence it may be collected in a manner agreeable to the rules of law that the teſtator intended a fee. This

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(*a*) In addition to the caſes cited in the former argument on this head, ſee what is ſaid by Lord *Kenyon* in *Doe d. Small* v. *Allen*, 8 *T. R.* 503.

1800.

Moore *v* Denn.

word occurred in the caſe of *Canning* v. *Canning*, but the effect now contended for was not allowed to it, and the caſe of *Hopewell* v. *Ackland*, *Salk*. 239. was there referred to by the Court as having ſettled that point.

The remaining conſideration is, Whether by the words "after payment of my juſt debts and funeral expences" an intention to paſs a fee is ſo denoted according to the eſtabliſhed rules of conſtruction, as to manifeſt an intention that thoſe debts and expences ſhould be a charge on the deviſee or on the lands in her hands. If theſe words are conſidered as charging the lands in the hands of the widow, in that caſe according to the eſtabliſhed principles ſhe would take a fee, or ſhe might otherwiſe be a loſer by the deviſe; if on the rents and profits of the lands her intereſt would be only for her life (*a*). In *Dickins* v. *Marſhall*, *Cro. Eliz.* 330. words nearly ſimilar and of the ſame import were uſed, *viz.* "after my debts and legacies paid," but it was held that only a life intereſt paſſed. In *Canning* v. *Canning* the ſame was adjudged where the words were, "after my juſt debts funeral expences and legacies are fully ſatisfied and paid."

I am free to own that I formerly held an opinion that the words of charge in this will were a charge on the lands in the hands of the deviſee; and that opinion was founded upon the then lateſt authority of *Doe d. Palmer* v. *Richards*, 3 *T. R.* 356. To me that caſe did then and does ſtill appear to bear a very cloſe reſemblance to the preſent. The words uſed by the teſtator in that caſe are almoſt exactly ſimilar to the preſent; excepting that in that caſe, after the deviſe of the reſt and reſidue of his lands, tenements, and hereditaments, and all perſonal eſtate whatſoever, the teſtator adds, "my legacies and funeral expences being *thereout* paid;" whereas in the preſent caſe the words are, "after payment of my juſt debts and funeral expences." The word "thereout" is a word of reference: it would be the ſame thing therefore if the words referred to were themſelves repeated, in which caſe the ſentence would run thus: "My legacies and funeral expences being paid out of the reſt and reſidue of my lands tenements and hereditaments and

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(*a*) Upon this ſubject ſee *Bro. Abr.* tit. *Teſtament*, pl. 18. tit. *Eſtates*, pl. 78. *Colyer*'s caſe, 6 *Co.* 16. *Wellock* v. *Hammond*, *Cro. Eliz.* 204. *Walker* v. *Collier*, *Cro. Eliz.* 378. *Spicer* v. *Spicer*, *Cro. Jac.* 527. *Greeve* v. *Dewell*, *Cro Jac.* 599. *Reed* v. *Hatton*, 2 *Mod.* 25. Sir *Thomas Muſchamp* v. *Bluet*, *Bridgm.* 132. *Redoubt* v. *Redoubt*, *Hil.* 1713, *Vin. Abr.* tit. *Deviſe*, *Q. a.* pl. 18. *Goodright d. Baker* v. *Stocker*, 5 *T. R.* 13. *Andrew* v. *Southouſe*, 5 *T. R.* 292. *Doe d. Willey* v. *Holmes*, 8 *T. R* 1.

all perſonal eſtate whatſoever." I am unable to diſtinguiſh the difference between deviſing lands to any one "*after* paying his legacies," or "his legacies being paid *thereout*." In both caſes they are to be paid out of the land which is the ſubject of the deviſe. A deviſe to an individual *after* paying debts ſeemed to me to mark the ſame intent of charging the land in the hands of the deviſee, as a deviſe to an individual, the teſtator's debts being paid *out of* the land deviſed. Accordingly I find, in the caſe of *Baddeley* v. *Leppingwell*, that Mr. Juſtice *Wilmot*, in giving the judgment of the Court, (Mr. Juſtice *Yates* being preſent,) where copyhold tenements had been deviſed without words of limitation to one ſiſter, ſhe paying thereout an annuity to another ſiſter, ſays thus: "It is objected that the teſtator has expreſsly directed 40*s.* a year to her ſiſter *Elizabeth* to be paid *thereout*; and it is urged that this is equivalent to making it payable out of the rents and profits; and I think it is ſo (*a*)." If then that be ſo, though there be no ſubſtantial difference between *Doe* d. *Palmer* v. *Richards* and the preſent caſe, yet I am of opinion, that notwithſtanding that determination the weight of authority obliges me to conclude that *Siſſily Carr* took only an eſtate for life.

After hearing the opinion of the judges, the Houſe on the motion of the Lord Chancellor reſolved, that the judgment of the Court of Exchequer Chamber ſhould be reverſed, and the judgment of the Court of King's Bench affirmed.

(*a*) 3 *Burr.* 1541.

M. TATTERSALL, Adminiſtratrix of W. TATTERSALL, *v.* GROOTE.

July 1ſt.

Covenant by the Plaintiff as adminiſtratrix on a breach ſubſequent to the death of her inteſtate, and judgment againſt her on demurrer: held that ſhe was not liable to coſts.

JUDGMENT for the Defendant having been given in this caſe, on demurrer to an action brought by the Plaintiff as adminiſtratrix, for breach of a covenant entered into with her inteſtate, but broken ſince his death (*vide ante*, p. 13.) a rule *niſi* was obtained on a former day to direct the prothonotary to tax the Defendant his coſts, notwithſtanding the Plaintiff ſued in the character of adminiſtratrix.

Shepherd Serjt. ſhewed cauſe. In the 23 *H.* 8. *c.* 15. which gives coſts to the Defendant upon a nonſuit or verdict in his favour, and in the 8 & 9 *W.* 3. *c.* 11. *ſ.* 2. which gives him coſts upon demurrer, executors are not named; and the ſame conſtruction has been put by the courts upon both ſtatutes. The Plaintiff, therefore, is not liable to coſts upon a demurrer, unleſs where he would be liable on a nonſuit or verdict againſt him. The principle on which the courts have proceeded, is, that where a Plaintiff is under the neceſſity of naming himſelf executor or adminiſtrator, there he ſhall not pay coſts; but if he might have brought the action in his own name, and yet names himſelf executor or adminiſtrator unneceſſarily, he ſhall pay them. *Harris et Ux.* v. *Hanna*, *Caſ. temp. Hardw.* 204. and *Cockerill* and Wife v. *Kynaſton*, 4 *T. R.* 277. In the preſent caſe it was impoſſible for the Plaintiff to have brought this action except in her character of adminiſtratrix; for though the breach was ſubſequent to the death of the inteſtate, yet the terms of the covenant under which the Plaintiff ſues, only enable her to declare as adminiſtratrix, being a covenant between the parties for "themſelves, their executors, and adminiſtrators."

Lens Serjt. in ſupport of the rule. The mere circumſtance of the Plaintiff being under the neceſſity of naming herſelf adminiſtratrix is not ſufficient to exempt her from the payment of coſts. The cauſe of action aroſe within her own time and her own knowledge; and according to *Lee* J. in *Harris* v. *Hanna*, "the rule is, that where the cauſe of action ariſes after the teſtator's death, the executor is liable for coſts, becauſe then he is ſuppoſed a ſufficient judge of the cauſe to found an action." So, in *Jenkins* and Wife v. *Plume*, 1 *Salk.* 207. the court ſay, "it is only by conſtruction that an executor is out of the 23 *H.* 8. and the reaſon is, becauſe he is not privy to the original cauſe of action." The ſame doctrine is recogniſed in *Bollard* v. *Spencer*, 7 *T. R.* 359. where Lord *Kenyon* obſerves, that "the rule excuſing executors from paying coſts is founded on this principle, that they are not ſuppoſed to be conuſant of the real ſituation of the teſtator's affairs."

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ELDON Ch. J. (who, after ſtating the caſe, proceeded thus): The ground on which this motion has been made is, that although the Plaintiff has ſued in her character of adminiſtratrix, yet that ſhe has ſued upon a cauſe of action which accrued in her own time, namely, the refuſal of the Defendant, after the death of the inteſtate, to nominate an arbitrator. After looking into all the caſes, we are of opinion, that if the cauſe of action aroſe in the time of the adminiſtratrix, and if it was not abſolutely neceſſary for her to ſue in her character of adminiſtratrix, ſhe will be liable to coſts. It is impoſſible to deny, that among the great variety of caſes upon this ſubject, and owing to the inclination of the Court to narrow the indulgence given to executors and adminiſtrators in this reſpect, ſome caſes are to be found in which the ſimple fact, that the cauſe of action has ariſen ſubſequent to the death of the teſtator or inteſtate, has been held ſufficient to ſubject the executor or adminiſtrator to coſts. But on a review of all the caſes, we think that the ſound doctrine to be collected from them is, that if the executor or adminiſtrator muſt ſue as ſuch on the contract made with the teſtator or inteſtate, he is not liable to the payment of coſts, though the cauſe of action aroſe after the death of the teſtator or inteſtate. This doctrine ſeems to be founded on the Act of Parliament of which all the caſes are an expoſition, namely the 23 *H.* 8. *c.* 15. Attending to the language of that Act, perhaps we may be authorized to ſay, that the ſound principle on which the exemption of the executors and adminiſtrators reſts, is not the degree of ignorance under which they may be ſuppoſed to lie, but that the exemption founds itſelf on the deſcription of the actions contained in the ſtatute in which coſts are to be paid. The words are "Any action, bill, or plaint of "debt or covenant upon any eſpecialty made to the Plaintiff or "Plaintiffs, or upon any contract *ſuppoſed to be made between the* "*Plaintiff or Plaintiffs and any other perſon or perſons.*" The ſtatute of 4 *Jac.* 1. *c.* 3. does not carry the matter farther. The expoſition of the early caſes ſeems to be, that if the contract be not made with the executor or adminiſtrator, but with the teſtator or inteſtate whom they repreſent, then it is not an action "upon a contract ſuppoſed to be made with the Plaintiff and any other perſon or perſons," in the language of the Act. Certainly the ſubſequent caſes have gone to the extent of ſaying, that if the Plaintiff could have declared on the tranſaction as on a contract made with himſelf, he ſhall be liable to coſts, though he does unneceſſarily deſcribe himſelf executor or adminiſtrator. In a caſe as early as 21 *Jac.* 1. *Treborn* v. *Claybrook*, *Winch.* 70. (*a*) it is laid down, "that if executors are nonſuit or judgment given againſt them upon a verdict, they ſhall not pay coſts within the

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(*a*) *Hutt.* 68. *S. C.*

23 *H.* 8. or 4 *Jac.* for the ſtatute ſpeaks of any contract or ſpecialty made with the Plaintiff, or between the Plaintiff and Defendant, and the executor brings an action upon the contract of another." So in *Anon.* 1 *Vent.* 92. the diſtinction taken is, that coſts ſhall not be paid where the action is merely in right of the inteſtate; but where it is needleſs for the Plaintiff to name himſelf executor or adminiſtrator, there they ſhall be paid. In *Bigland* v. *Robinſon*, 3 *Salk.* 105. it is laid down, that wherever an executor muſt ſue as ſuch, as for inſtance, where he brings debt on bond due to his teſtator, he ſhall not pay coſts. And in *Portman* v. *Cane*, 2 *Ld. Raym.* 1413. the ſame doctrine was held, where a breach was aſſigned in the time of the executor, the Court ſaying the bond was the cauſe of action, and the Plaintiff could not ſue but as executor. Again, in *Nicholas* v. *Killigrew*, 1 *Ld. Raym.* 437. it was agreed, that it is not to any purpoſe for a Plaintiff to name himſelf executor where he ought not ſo to do, but that if he ground his action upon the ſame contract that was to the teſtator, he ſhall not pay coſts if he fail in the ſuit. This diſtinction ſaves whole all the caſes where an executor could declare upon a converſion in his own time: in ſuch caſe he ſtands in the ſituation of an aſſignee, and the contract may be conſidered as made with himſelf. And it does ſeem to me, that this diſtinction is the true principle to be extracted from the three caſes in the *Term Reports* of *Cockerill and Wife* v. *Kynaſton*, *Goldthwayte and Wife* v. *Petrie* (*a*), and *Bollard and Wife* v. *Spencer*. Perhaps it may be enough to refer generally to theſe caſes, the ſubſtance of which is well collected in *Hullock's Law of Coſts* (*b*), in the new edition of *Bacon's Abridgement*, by *Gwillim*, and in p. 349. of a new treatiſe on the *Law of Executors and Adminiſtrators*, by a gentleman of *Lincoln's Inn* (*c*). Without ſtating it to be poſſible to reconcile all the caſes, it is enough for us to ſay, that the doctrine laſt adopted proceeds on the principle which I have now mentioned. The caſe, therefore, is reduced to this: it being admitted that the cauſe of action aroſe in the life of the adminiſtratrix, could ſhe declare on this contract as made with herſelf? We think that ſhe neceſſarily named herſelf adminiſtratrix, and that ſhe is therefore not liable to the payment of coſts.

Per Curiam, Rule diſcharged (*d*).

(*a*) 5 *Term Rep.* 234.

(*b*) From p. 173 to 199.

(*c*) *Toller's Law of Executors and Adminiſtrators.*

(*d*) Vide etiam *Wilton Executrix* v. *Hamilton*, *ante*, vol. 1. p. 445.

Da Costa *v.* Clarke.

July 1ſt.

Plaintiff in *replevin* pleaded in bar to, that the *locus in quo*, from time whereof, *&c.* ought to be open and common "*on or before* the 15th of *October*, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks *and upwards*;" that the Plaintiff, the time when, *&c.* put in his cattle, "the ſame time being when the ſaid field was and ought to be open and common *as aforeſaid*." Held that the plea was bad for uncertainty even after verdict, the right of common being too generally deſcribed both in its commencement and concluſion.

Replevin of a cow. The Defendant pleaded, 1ſt, the general iſſue *non cepit:* 2dly, an avowry that as leſſee of the *locus in quo* he diſtrained the cow damage feaſant: 3dly, a cognizance as bailiff of one *R. L.*, to whom he had he had underlet the *locus in quo*. After joining iſſue on *non cepit*, the Plaintiff pleaded in bar to the avowry, "that the ſaid field called *Broad Field*, containing divers, to wit, 100 acres, whereof the ſaid place in which, *&c.* was and is parcel as aforeſaid from time whereof the memory of man is not to the contrary of right hath been, and ought to have been, and ſtill of right ought to be open and common, in manner following; that is to ſay, open every third year, that is to ſay, *on or before* the 15th day of *October*, when the corn was cut and carried off the ſame for a long time, to wit, for three weeks and upwards;" and that before the ſaid time, when, *&c.* one *I. B.* was ſeiſed in fee of a meſſuage and two acres of land, with the appurtenances ſituate at, *&c.*; and that he and all thoſe, whoſe eſtate he had and hath in the ſaid meſſuage and land, with the appurtenances for the time being, from time whereof, *&c.* have uſed and been accuſtomed to have, and of right ought to have for themſelves and their tenants, occupiers of the ſaid meſſuage and land, with the appurtenances, common of paſture for all his and their commonable cows, *levant & couchant*, on the ſaid meſſuage and land, with the appurtenances in the ſaid field called *Broad Field*, of which the ſaid place, in which, *&c.* is parcel, "every third year when the ſame was open, and not ſown and cultivated in manner aforeſaid," as to the ſaid meſſuage and land, with the appurtenances appertaining; that the ſaid *I. B.* demiſed to the plaintiff from year to year; that by virtue of this demiſe the Plaintiff became poſſeſſed of the ſaid meſſuage and lands, with the appurtenances, and being ſo poſſeſſed before the ſaid time when, *&c.* put the ſaid cow, being his commonable cow, levant & couchant, on his ſaid meſſuage and land, with the appurtenances, into the ſaid field, to uſe his common of paſture there, as it was lawful for him to do, "the ſame time and from thence until and at the taking of the ſame as aforeſaid,

1800.

Da Costa v. Clarke.

being when the ſaid field was and ought to be open and common as aforeſaid;" that the cow was in the ſaid place in which, &c. parcel, &c. until Defendant of her own wrong, &c. And this, &c. wherefore, &c. To the cognizance a ſimilar plea in bar was pleaded. The Defendant replied, that *Broad Field* ought to be open every third year, only whilſt every part thereof has been unſown with corn or grain, and not at any time after or whilſt the ſame or any part thereof hath been ſown with corn or grain. This the Plaintiff traverſed in his rejoinder, and upon that point iſſue was joined.

This cauſe was tried at the *Weſtminſter* ſittings after *Hilary* term, before Lord *Eldon*, Ch. J. when a verdict was found for the Plaintiff.

In *Eaſter* term *Marſhall* Serjt. moved for a rule, calling on the Plaintiff to ſhew cauſe why judgment ſhould not be entered for the Defendant, *non obſtante veredicto*: 1ſt, becauſe the preſcription as laid was uncertain, ſince it was not ſhewn how long before the 15th of *October* the right of common was to commence, or how long after the three weeks it was to continue. On this point he cited *Greene* v. *Berry*, 2 *Roll. Abr.* 264, 5. *Vin. Abr.* tit. *Preſcription*, D. where a preſcription for copyholders to pay two years rent, *or leſs*, upon renewal, was held void for uncertainty; and *Allen*'s caſe, *ibid.*, where the ſame was held of a preſcription to pay one penny, *or thereabouts*, for tithes; alſo *Selby* v. *Robinſon*, 2 *T. R.* 758. where the cuſtom alleged was for *poor neceſſitous and indigent houſeholders* to carry away rotten boughs in a chaſe; and *Broadbent* v. *Wilkes*, *Willes*, 360. (*a*) where the cuſtom was for the owners of certain pits to lay the coals and rubbiſh *near* to ſuch pits: 2dly, becauſe the preſcription for common was not conformable to the cuſtom alleged at *Broad Field*, and that the exerciſe was not conformable to the preſcription; for the cuſtom laid was that *Broad Field* is open every third year when the corn is cut and carried off, the common preſcribed for was, when *Broad Field* is open and not ſown and cultivated; and the exerciſe was ſtated to have been not during the three weeks when the corn was cut and carried off, nor when the field was not ſown or cultivated, but when *Broad Field* was open and common as aforeſaid.

A rule *niſi* was granted; which, having been enlarged to this term, *Bayley* Serjt. now ſhewed cauſe. The cuſtoms alleged in the

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(*a*) See alſo the caſes there collected by the learned Editor.

the caſes cited were poſitively uncertain. Uncertainty being made part of the cuſtom, certainty was neceſſarily excluded. But in this caſe, the words "three weeks and upwards" are equivalent to "three weeks at leaſt." How much longer may depend upon many circumſtances; which circumſtances the Plaintiff is not bound to ſtate, ſince it is unneceſſary for a Plaintiff to ſtate more of a preſcription than will juſtify himſelf. The queſtion then will be, Whether, as the Plaintiff has ſtated that the field ought to be "open and common for three weeks and upwards," and that when the Plaintiffs cattle were put it was "open and common as "aforeſaid," the Court will not intend, after verdict and iſſue taken upon a collateral point, that the cattle were put in during the three weeks. Though theſe pleas might have been ſubject demurrer, yet the matter of a plea muſt be taken moſt favourably for the party pleading after iſſue joined on a collateral point; and if it be doubtful in what manner words are to be underſtood, they ſhall be ſo taken as to ſupport the verdict. *Stennet* v. *Hogg*, 1 *Saund.* 227. *Bedam* v. *Clerkſon*, 1 *Ld. Raym.* 123. *Crowther* v. *Oldfield*, 2 *Ld. Raym.* 1225. *Avery* v. *Hoole*, *Cowp.* 825.

Lord **ELDON**, Ch. J. (ſtopping *Marſhal* on the other ſide). We are of opinion, that the preſcription ſtated is too uncertain, both with reſpect to its commencement and duration, to ſupport the verdict. The reaſoning in ſupport of the plea in bar would have been very ſtrong, if the Plaintiff had averred that the cattle were put in within the three weeks. But the words are, "when the field was and ought to be open and common *as aforeſaid*." And we think that theſe words muſt refer to the three weeks *and upwards*, and that they do not aſcertain whether the cattle were put in during the three weeks, or during that time which is included under the words "and upwards." And though the words for "three weeks and upwards" are under a *videlicet*, yet if we could ſuppoſe them to be ſtruck out, the averment would then be, that the field ought to be open on or before the 15th of *October*, when the corn is cut and carried off the ſame *for a long time*, which without a qualification of the length of time, would be too uncertain to be ſupported. It alſo appears to us, that it is not ſufficiently pointed out, when the common is to commence, ſince it may happen that the corn may not be cut and carried before the 15th of *October*, or even before the end of three weeks after that day. The Court will infer almoſt anything after verdict; but we think

1800.

DA COSTA *v.* CLARKE.

think in this caſe there can be no inference to uphold the allegations of the ſpecial plea.

Per Curiam, Rule abſolute.

July 1ſt.

HANDCOCK *v.* BAKER and three Others.

A private perſon may juſtify breaking and entering the Plaintiff's houſe, and impriſoning his perſon, to prevent him from committing murder on his wife.

TRESPASS for breaking the Plaintiff's dwelling-houſe, and aſſaulting him therein, and dragging him out of bed, and forcing him without cloaths out of his houſe along the public ſtreet, and beating and impriſoning him without cauſe.

Two of the Defendants ſuffered judgment by default, and the other two pleaded, 1ſt, not guilty: 2dly, that the Plaintiff in the ſaid dwelling-houſe broke the peace and aſſaulted his wife, and purpoſed to have feloniouſly killed and ſlain her, and was on the point of ſo doing; and that her life being in great danger ſhe cried murder and called for aſſiſtance; whereupon the Defendants, for the preſervation of the peace, and to prevent the Plaintiff from ſo killing and ſlaying his wife, and committing the ſaid felony, endeavoured to enter by the door, and knocked thereat; and becauſe the ſame was faſtened, and there was reaſonable cauſe to preſume that the wife's life could not have been otherwiſe preſerved than by immediately breaking open the door and entering the ſaid dwelling-houſe, and they could not otherwiſe obtain poſſeſſion, they did for that purpoſe break and enter the ſaid dwelling-houſe, and ſomewhat break, &c. doing as little damage as poſſible, and gently laid hands on the Plaintiff, and prevented him from further aſſaulting and feloniouſly killing and ſlaying his ſaid wife; and for the ſame purpoſe and alſo for that of taking and delivering the Plaintiff to a conſtable, to be by him taken before a juſtice, and dealt with according to law, kept and detained him a ſhort and reaſonable time in that behalf, and becauſe he had not then proper and reaſonable cloaths on him, took their hands off from him, and permitted him to enter a bed-chamber, and to remain there a reaſonable time, that he might put on ſuch cloaths, which he might have done; and becauſe he did not nor would ſo do, but wholly refuſed and went into bed there, and remained there at the end of ſuch reaſonable time, and would not quit the ſame, although thereto requeſted, the Defendants for the ſame purpoſes as they ſo kept and detained the Plaintiff as abovementioned, there being then no reaſonable ground for preſuming that he had changed his purpoſe of further aſſaulting and feloniouſly ſlaying his ſaid wife, entered the bed-chamber in order for thoſe purpoſes to take him therefrom, whereupon the Plaintiff aſſaulted and would have beat the ſaid Defendants if they had not defended themſelves, which they did, and if any damage happened to the Plaintiff it was occaſioned by his own aſſault, and the Defendants for the purpoſes in that behalf aforeſaid, gently laid hands upon the Plaintiff and took him from the bed and out of the dwelling-houſe along the public ſtreets for a reaſonable time, and kept and detained him for a ſhort and reaſonable time for thoſe purpoſes, till they could find a conſtable, and as ſoon as they could find a conſtable delivered him to the conſtable for the purpoſe in that behalf aforeſaid.

The Plaintiff replied *de injuriâ ſuâ propriâ*, and by way of new aſſignment pleaded, that he ſued out his writ and declared as well for the treſpaſſes juſtified, as alſo for that the Defendants at the times when, *&c.* beat and ill-treated the Plaintiff with much greater violence and impriſoned him for a longer time than was neceſſary and proper for any of the purpoſes in the plea mentioned.

Iſſue having been joined on the replication and new aſſignment, the cauſe was tried before *Groſe* J. at the laſt Spring aſſizes for *Norfolk*, when the jury found for the Plaintiff on the general iſſue, and for the defendants on the ſpecial juſtification.

In *Eaſter* term laſt a rule *Niſi* was obtained calling on the Defendants to ſhew cauſe why the judgment for the Defendants on the ſpecial juſtification ſhould not be arreſted, and a verdict entered for the Plaintiff on the general iſſue, with 1*s.* damages. The caſe having ſtood over till this term.

Shepherd and *Williams* Serjts. now ſhewed cauſe, and contended that if the Defendants were juſtified in entering the Plaintiff's houſe and preventing him from killing his wife in the firſt inſtance, they were alſo juſtified in taking the proper means to prevent him from accompliſhing that purpoſe at any time while the ſame intent continued; that after verdict, the allegation that "there was no reaſonable ground for preſuming that he had changed his purpoſe of further aſſaulting and feloniouſly ſlaying his ſaid wife" muſt be taken to have been proved; they cited 9 *Ed.* 4. 26. *b.* *Bro. Ab.* tit. *Treſpaſs*, pl. 184. where to treſpaſs for aſſault and impriſonment the

Defendant

1800.

HANDCOCK *v.* BAKER and three Others.

Defendant pleaded, that the Plaintiff was lying in wait in the highway to rob the King's ſubjects, that one *Alice* was riding on the ſame highway, againſt whom the Plaintiff drew his ſword and commanded her to deliver her purſe, whereupon ſhe levied hue and cry, that the Defendant was riding there and heard the cry, and returned and took the Plaintiff, and becauſe there were no ſtocks in the vill he carried him to *S.* and there delivered him to the conſtable; and the plea was held good by the whole Court, and *Moile* ſaid, if one ſay to me, "See this man, I will certainly kill him," in this caſe I may hold him ſo that he do not kill the man, and this holding is no impriſonment (*a*); they alſo referred to 22 *Ed.* 4. 45. *b.* 2 *Rol. Ab.* tit. *Treſpaſs*, *E.* 4. where it is ſaid by *Fairfax*, "If you ſee two men fighting ſo that one may perhaps kill the other, it is legal for you to part them and to put one in your houſe till his paſſion be paſſed."

Sellon and *Bayley* Serjts. in ſupport of the rule obſerved, that the caſes were diſtinguiſhable from the caſe in queſtion, inaſmuch as this was a caſe of interference between huſband and wife, the former of whom has to a certain extent the power of correcting the latter; that although the Defendants, if they had ſeen the wife in actual danger, might perhaps have been juſtified; yet without any warrant or conſtable they could not interfere by way of prevention, merely becauſe the intention continued; that the law has provided a remedy for the wife in caſe the huſband threaten to beat or to kill her; ſhe may either have a writ of *ſupplicavit* out of *Chancery*, *F. N. B.* 80. or exhibit articles of the peace in the *King's Bench*; that in this caſe it did not appear even that the wife was preſent at the time when the Plaintiff was taken out of bed; whereas it was neceſſary for the Defendants to allege, not only that the Plaintiff had the intent but the power to kill his wife; and that in order to juſtify the impriſonment, they ſhould alſo have averred that the intention continued during the whole time in which the Plaintiff was detained by the Defendants.

Lord ELDON Ch. J. If the reaſoning be good that a wife ought to apply for aſſiſtance to thoſe courts where the law has provided aſſiſtance for her, it will equally apply to the firſt entry of the houſe by the Defendants, as to the ſubſequent aſſault and impriſonment which is ſtated to have taken place in the bed-room. I think, however,

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(*a*) In that caſe it is alſo ſaid by *Needham*, "In theſe caſes, he may arreſt and commit to gaol if he *intends* to do a felonious act."

however, that a wife is only bound to apply to thoſe remedies, where it is probable that the injury to be apprehended will be prevented by ſuch application. In this caſe the Plaintiff being about to commit a felony by killing and ſlaying his wife, the Defendants interfered by breaking and entering the houſe in order to prevent the execution of that intent: and "for the ſame purpoſes," that is, with a view to prevent the Plaintiff from killing and ſlaying his wife, they afterwards committed the injury complained of in the bed-room, into which they had permitted him to enter in order to put on neceſſary clothes. It is ſtated that there was no reaſonable ground for preſuming that the Plaintiff had changed his purpoſe; and it is argued that it ought to have been averred that his purpoſe actually continued: but if the preceding allegation be true, that the Defendants entered the bed-room for the ſame purpoſes for which they had previouſly entered the houſe, the latter allegation was unneceſſary; ſince the averment that it was for the ſame purpoſes ſufficiently brought the queſtion before the jury, Whether or not the Defendants entered the bed-chamber and detained the Plaintiff for the purpoſe of preventing him from killing and ſlaying his wife? It is not difficult to conceive that under ſome circumſtances it might be more eſpecially the Defendants' duty to interfere in that manner. Suppoſe *A.* endeavour to lay hold of *B.* who is in purſuit of *C.* with an intent to kill him, and *B.* thereupon ceaſes to purſue with the view of effecting his purpoſe with more cunning, the act of ceaſing to run, ſo far from being evidence of an intention to deſiſt from his purpoſe, might afford ſtrong evidence of an intention to proſecute it with more effect; in which caſe the detention of *B.* would be juſtified. In this caſe the jury were competent to conſider whether under all the circumſtances of the caſe, including the preſence or abſence of the wife, the Plaintiff got into bed with a view of more effectually executing his intent to kill his wife. In fact the jury have found that the Defendants kept and detained the Plaintiff after he had gone into the bed-room for the ſame purpoſes for which they kept and detained him before. With reſpect to the averment which has been ſuppoſed to be neceſſary, it is ſufficient to anſwer, that after verdict it muſt be preſumed that every thing is proved which is neceſſary to ſupport the verdict; and the jury have found that it was neceſſary for the preſervation of the woman's life that the Defendants ſhould do what they did.

1800.

HANDCOCK *v.* BAKER and three Others.

HEATH J. I am of the ſame opinion. It is a matter of the laſt conſequence that it ſhould be known upon what occaſions by-ſtanders may interfere to prevent felony (*a*). In the riots which took place in the year 1780, this matter was much miſunderſtood, and a general perſuaſion prevailed that no indifferent perſon could interpoſe without the authority of a magiſtrate; in conſequence of which much miſchief was done, which might otherwiſe have been prevented. In this caſe the Defendants broke and entered the Plaintiff's houſe in order to prevent the commiſſion of murder, and that ſeems to have been admitted to be a good juſtification. The only diſpute therefore turns on the propriety of their conduct towards the Plaintiff after they had ſuffered him to go into the bed-room. Now I think that enough is ſtated in the juſtification to ſupport the verdict, ſince the jury have thought that the conduct of the Defendants was right. After verdict we may ſuppoſe any thing. We may ſuppoſe that the Plaintiff's paſſion continued, and that he again declared that he would kill his wife.

(*a*) Indeed there ſeems to be very high authority for the interference of private individuals in caſes of riot, though no felony be committed. The queſtion underwent a very ſolemn diſcuſſion in 1597 (39 *Eliz.* at which time the country was in a very unquiet ſtate,) before all the judges in a caſe which is called "Caſe of armes." *Poph.* 121., and is as follows: "Upon an aſſembly of all the juſtices and barons at *Serjeants Inn* this term, on *Monday* the 15th day of *April*, upon this queſtion moved by *Anderſon* Ch. J. of the Common Bench; Whether men may arm themſelves to ſuppreſs riots, rebellions, or to reſiſt enemies and to endeavour themſelves to ſuppreſs or reſiſt ſuch diſturbers of the peace or quiet of the realm? And upon good deliberation it was reſolved by them all, that every juſtice of peace, ſheriff and other miniſter *or other ſubject of the king* where ſuch accident happen may do it; and to fortify this their reſolution, they peruſed the ſtatute of 2 *Ed.* 3. 3. which enacts, that none be ſo hardy as to come with force or bring force to any place in affray of the peace, nor to go or ride armed night nor day, unleſs he be a ſervant to the king in his preſence, and the miniſters of the king in the execution of his precepts, or of their office and thoſe who are in their company aſſiſting them, *or upon cry made for weapons to keep the peace*, and this in ſuch places where accidents happen, upon the penalty in the ſame ſtatute contained; whereby it appeareth that upon cry made for weapons to keep the peace, every man where ſuch accidents happen for breaking the peace, may by the law arm himſelf againſt ſuch evil-doers to keep the peace. But they take it to be the more diſcreet way for every one in ſuch a caſe to attend and be aſſiſtant to the juſtices, ſheriffs, or other miniſters of the king in the doing of it." This caſe is ſpoken of with approbation by the judges in the great caſe of *Meſſenger* and others, *Kel* 76. and its principle is adopted by *Hawkins* in his pleas of the crown, *lib.* 1. *c.* 65. *ſ.* 11. where he ſays, "It hath been holden that private perſons may arm themſelves in order to ſuppreſs a riot, from whence it ſeems clearly to follow that they may alſo make uſe of arms in the ſuppreſſing of it if there be a neceſſity for ſo doing." he adds indeed, that it ſeems hazardous for private perſons to go ſo far in common caſes, and that ſuch violent methods ſeem only proper againſt ſuch riots as ſavour of rebellion.

ROOKE J. I am of the ſame opinion. It is highly important that by-ſtanders ſhould know when they are authoriſed to interfere. In this caſe the life of the wife was in danger from the act of the huſband. The Defendants therefore were juſtified in breaking open the houſe, and doing what was neceſſary for the preſervation of her life. The jury find that they have done this.

CHAMBRE J. There is a great difference between the right of a private perſon in caſes of intended felony and of breach of the peace. It is lawful for a private perſon to do any thing to prevent the perpetration of a felony. In this caſe it is ſtated that the Plaintiff purpoſed feloniouſly to kill and ſlay his wife, to prevent which the Defendants interfered in the manner ſtated in the plea. The juſtification has been found by the verdict; and the Defendants therefore are entitled to the judgment of the Court.

Rule diſcharged.

WARD *v.* HARRIS.

July 1ſt.

The declaration ſtated that in conſideration that the Plaintiff had ſold to the Defendant a *certain horſe* of the Plaintiff, at and for a *certain quantity of certain oil*, to be delivered within a *certain time*, which had elapſed before the commencement of the ſuit, the Defendant promiſed to deliver the ſaid oil accordingly. Held well enough after verdict.

ASSUMPSIT. The firſt count of the declaration ſtated, that whereas on, &c. at, &c. in conſideration that the Plaintiff, at the ſpecial inſtance and requeſt of the Defendant then and there ſold to the Defendant a *certain horſe* of the ſaid Plaintiff, at and for a *certain quantity of certain oil*, to be therefore delivered by the ſaid Defendant to the ſaid Plaintiff *within a certain time*, which elapſed before the commencement of this ſuit, and then and there delivered the ſaid horſe to the ſaid Defendant, he the ſaid Defendant undertook and then and there faithfully promiſed the ſaid Plaintiff to deliver the ſaid oil to the ſaid Plaintiff accordingly; yet, the Defendant although often requeſted, hath not delivered the ſaid oil or any part thereof to the ſaid Plaintiff, but hath hitherto wholly neglected, &c.

The other counts were general, and *non aſſumpſit* was pleaded.

The cauſe was tried before Lord *Eldon* Ch. J. at the ſittings after laſt *Hilary* term, and a verdict was found for the Plaintiff.

In *Eaſter* term laſt, *Cockell* Serjt. having obtained a rule calling upon the Plaintiff to ſhew cauſe why judgment ſhould not be arreſted for the uncertainty of the declaration, *Shepherd* and *Bayley* Serjts. ſhewed cauſe. Whatever might have been the fate of this declaration on ſpecial demurrer, ſtill it is well enough after verdict. Indeed if the objection of uncertainty prevail in this inſtance, it muſt prevail in almoſt every action of *aſſumpſit*. It is true, that in treſpaſs more certainty is requiſite as to the thing demanded. But both Lord *Mansfield* and *Yates* J. in *Bertie* v. *Pickering et Ux.* 4 *Burr.* 2455. obſerved that the reaſon of the diſtinction is, that the Defendant in treſpaſs may be able to juſtify the taking. General words are ſufficient where the certainty lies within the Defendant's notice, *Com. Dig.* tit. *Pleader*, *C.* 26. Indeed in this caſe, if the words of the declaration had been "a certain quantity, to wit, ſo many gallons, of certain oil, to wit, of ſuch a ſort," the declaration would clearly have been good. And although the omitting to ſpecify the quantity and ſpecies under a to wit, might have been cauſe of ſpecial demurrer, yet after verdict, it muſt be preſumed that the jury have aſcertained thoſe circumſtances. Beſides, the count is not particularly uncertain. For if the agreement had been that the Plaintiff ſhould ſell his horſe to the Defendant to be paid for in money without mentioning any price, the law would have implied, that the Defendant ſhould pay as much money as the horſe was worth. So here the agreement being that the Plaintiff ſhould ſell his horſe to be paid for in oil, the law will imply that the Defendant ought to deliver ſuch a quantity of oil as would amount to the value of the horſe, though he be at liberty to make up the amount in any ſpecies of oil which he may think proper.

Cockell Serjt. *contrà* obſerved, that the Plaintiff profeſſed to declare on a ſpecial contract, and yet had not ſpecified what the terms of that contract were; that admitting this general mode of declaring to be good in the caſe of a ſale for money, yet that this was not a ſale but an exchange; the commutation of goods for money being a ſale, but the commutation of goods for goods being an exchange. 2 *Bl. Com.* 446.

Lord ELDON Ch. J. At the trial it appeared to me that it would be very difficult to ſupport this count. It is true that it makes a difference whether the objection be taken before or after verdict; but on the beſt conſideration which I have been able to give the caſe, it ſtrikes me that the count cannot be ſupported even after verdict. The paſſage cited from *Blackſtone's Commentaries* amounts to no more than this, that exchange is not a ſale, and ſale is not exchange. If the conſideration of a contract be goods, though in one ſenſe of the word this contract may be called an exchange, yet in another ſenſe it may be called a ſale, for it is not neceſſary to a ſale that money ſhould paſs. The declaration in this caſe ſtates, that the Plaintiff at the ſpecial inſtance and requeſt of the Defendant, ſold to the Defendant a certain horſe of the Plaintiff, but it does not ſtate what the value of the horſe was, and I do not know that it is a term of ſuch a contract ariſing by neceſſary legal implication, that the horſe was to be ſold for its value. The declaration proceeds, "at and for a certain quantity of certain oil to be therefore delivered by the ſaid Defendant to the ſaid Plaintiff within a certain time, which elapſed before the commencement of the ſuit." In the caſe of a ſale for money, as the law implies that ſo much money ſhall be paid as the article is worth, no diſpute can ariſe concerning the quality of what is to be received, the quality of money being always the ſame. I incline therefore to think it neceſſary to expreſs value in ſome manner in ſuch a contract as this, where ſomething other than money, is to be given for a commodity. Here the value of the horſe is not ſtated; the value of the oil is not ſtated, nor is any thing ſtated with reſpect to the quantity or quality of the oil. It appears to me, that the terms of the declaration leave it ſo wholly uncertain what the ſpecial contract was, that we cannot tell what we ſhall intend it to have been. Enough does not appear upon the declaration to enable us to ſay what the contract meant to be alleged muſt be, as it would have appeared on the record if ſome other averments had been put on that record, or as it muſt have been proved before a jury. This may have been a ſpecial contract that any quantity of any oil of the value of the horſe ſhould be given for the horſe; it may have been a ſpecial contract, that a certain ſpecific quantity of certain ſpecified oil, not ſo great or greater in value than the horſe ſhould bs given for the horſe: the real terms of the contract may be different from either of theſe, and the proper damages may vary infinitely. I doubt whether this, after verdict, can be conſidered as a contract defectively ſtated. When it is to be collected from the record what ſpecial contract was meant to be ſtated, the defect of the ſtatement on the record, may be ſupplied by intending proof before a jury; but here the record does not ſtate any ſpecial contract, ſo that I can be certain what I can intend as having been proved

1800.

Ward
v.
Harris.

before the jury. Upon the whole, it does not appear to me that the declaration ſtates enough of any contract.

Accordingly *The Court* made the rule abſolute for arreſting the judgment. But on the following day intimated that they wiſhed to conſider further of their opinion.

Lord **Eldon** Ch. J. on this day ſaid—My brothers *Heath*, *Rooke*, and *Chambre* are all of opinion, that the objections which have been taken to this declaration cannot prevail after verdict. I yield to their authority.

Rule diſcharged.

July 1ſt.

Cowell, Adminiſtrator of Cowell, *v.* Edwards.

It ſeems that one of ſeveral co-ſureties in a bond may recover againſt any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of ſureties; though the inſolvency of the principal and of the other ſureties be not proved.

Indebitatus aſſumpſit for money paid.

John Cowell the Plaintiff's inteſtate having entered into a joint and ſeveral bond with ſeven other perſons, two of whom were principals and the five others as well as himſelf ſureties, was together with his co-ſureties called upon by the obligees to pay the ſum engaged for; the Defendant and two of the other ſureties paid each a part of that ſum, but the preſent Plaintiff's inteſtate paid the reſidue. Upon this the Plaintiff conſidering the Defendant and one of the two ſureties who had already contributed as the only ſolvent ſureties, called upon them to pay their proportion and now brought this action to recover from the Defendant ſuch a ſum of money, as when added to what had been already paid by him would make up one-third of the whole ſum paid to the obligees, deducting only what had been contributed by the fourth ſurety not called upon at this time.

The cauſe was tried before Lord *Eldon* Ch. J. at the ſittings after laſt *Eaſter* term, when the Plaintiff obtained a verdict for a ſixth of the whole ſum paid, not allowing for the ſum paid by the fourth ſurety, with liberty to move the Court to enter a verdict for the whole demand.

Lens Serjt. however on the part of the Defendant obtained a rule calling upon the Plaintiff to ſhew cauſe why this verdict ſhould not be ſet aſide altogether and a new trial be had. He took theſe objections; that this action could not be maintained at law by one co-ſurety againſt another; that if the action could be maintained for one-ſixth of the whole ſum engaged for, and which, under the circumſtances of the preſent caſe, he inſiſted was all that could be recovered from the Defendant; yet, that the inſolvency of the two principals and of the three other co-ſureties ſhould have been proved in order to entitle the Plaintiff to the preſent verdict.

Shepherd and *Vaughan* Serjts. were proceeding on this day to ſhew cauſe, and cited *Deering* v. Lord *Winchelſea* (*a*), when they were ſtopped by

The Court, who obſerved that it might now perhaps be found too late to hold that this action could not be maintained at law, though neither the inſolvency of the principals or of any of the co-ſureties were proved; but that at all events the Plaintiff could not be entitled to recover at law more than one-ſixth of the whole ſum paid.

And Lord *Eldon* Ch. J. ſaid, that he had converſed with Lord *Kenyon* upon the ſubject, who was alſo of opinion that no more than an aliquot part of the whole, regard being had to the number of co-ſureties, could be recovered at law by the Defendant; though if the inſolvency of all the other parties were made out, a larger proportion might be recovered in a court of Equity.

In conſequence of theſe intimations from the Court, and of an opinion thrown out by them that the matter muſt ultimately be carried into a court of Equity, an offer was made by the Defendant and acceded to by the other ſide, to enter a nonſuit without coſts.

Nota; Lord *Eldon* alſo added a doubt of his own, Whether a diſtinction might not be made between holding that an action at law is maintainable in the ſimple caſe where there are but two ſureties, or where the inſolvency of all the ſureties but two is admitted, and the inſolvency of the principal is admitted, and holding it to be maintainable in a complicated caſe like the preſent, ſuch inſolvency being neither admitted nor proved, and where the Defendant after a verdict againſt him at law may ſtill remain liable to various ſuits in Equity with each of his other co-ſureties, and where the event of the action cannot deliver him from being liable to a multiplicity of other ſuits founded upon his character as a co-ſurety.

(*a*) See the next caſe.

(*The Reporters have been favoured with a Manuſcript Note of the Caſe of* Deering v. *Lord* Winchelſea *referred to in the preceding argument.*)

(IN THE EXCHEQUER.)

Feb. 8th, 1787.

Sir EDWARD DEERING *v.* The Earl of WINCHELSEA, Sir JOHN ROUS, and the Attorney-General.

If *A.*, *B.* and *C.* become bound as ſureties for *D* in three ſeparate bonds, and any one of them be compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their reſpective bonds.

LORD Chief Baron EYRE (preſent *Hotham* and *Perryn* Barons) delivered the opinion of the Court.

Thomas Deering, younger brother of the Plaintiff, was appointed in 1778 receiver of fines and forfeitures of the cuſtoms of the outports, and entered into three bonds, each in the penalty of 4000 *l.* with condition for duly accounting; in one of which the Plaintiff joined as ſurety, in another Lord *Winchelſea*, and Sir *John Rous* in the third. *Thomas Deering* became inſolvent and left the country; the balance due to the crown was 6602 *l.* 10 *s.* 8 *d.* part of which was levied on his effects, and when the bill was filed there was due 3883 *l.* 14 *s.* 8½ *d.* which was rather leſs than the penalty of each of the bonds. The bond in which the Plaintiff had joined was put in ſuit againſt him, and judgment obtained. He filed his bill demanding contribution againſt Lord *Winchelſea* and Sir *John Rous*, and praying an account of what was due to the crown and money levied on the Plaintiff (ſuppoſing execution to follow the judgment), and that Lord *Winchelſea* and Sir *John Rous* might contribute to diſcharge the debt of *Thomas Deering* as two of the ſureties for that debt. The appointment, the three bonds, and the judgment againſt the Plaintiff, were in proof, and the balances were admitted by all parties.

The Lord Chief Baron after ſtating the caſe obſerved, that contribution was reſiſted on two grounds; firſt, that there was no foundation for the demand in the nature of the contract between the parties, the counſel for the Defendants conſidering the title to contribution as ariſing from contract expreſſed or implied; ſecondly, that the conduct of Sir *Edward Deering* had deprived him of the benefit of any equity which he might have otherwiſe had againſt the Defendants.

The Lord Chief Baron conſidered the ſecond objection firſt. The miſconduct imputed to Sir *E. Deering* was, that he had encouraged his brother in irregularities, and particularly in gaming, which had ruined him, and had done this knowing his fortune to be ſuch that he could not ſupport himſelf in his extravagances and faithfully account to the crown; that Sir *E. Deering* was privy to his brother's breaking through the orders given him to depoſit the money he received in a cheſt under the key of the comptroller. His Lordſhip obſerved that this might be true, and certainly put Sir *E. Deering* in a point of view which made his demand indecorous; but it had not been made out to the ſatisfaction of the Court that this conſtituted a defence. Mr. *Maddocks* had ſtated that the author of the loſs ſhould not have contribution; but ſtated neither reaſon nor authority to ſupport the principle he urged. If theſe were circumſtances which could work a diſability in the Plaintiff to ſupport his demand, it muſt be on the maxim, "that a man muſt come into a court of Equity with clean hands;" but general depravity is not ſufficient. It muſt be pointed to the act upon which the loſs ariſes, and muſt be in a *legal* ſenſe the cauſe of the loſs. In a *moral* ſenſe Sir *E. Deering* might be the author of the loſs; but in a *legal* ſenſe *Thomas Deering* was the author; and if the evil example of Sir *E. Deering* led him to it, yet this was not what a court of Juſtice could take cognizance of. There might indeed be a caſe in which a perſon might be in a *legal* ſenſe the author of the loſs, and therefore not entitled to contribution; as if a perſon on board a ſhip was to bore a hole in the ſhip, and in conſequence of the diſtreſs occaſioned by this act it became neceſſary to throw overboard his goods to ſave the ſhip. This head of defence therefore fails. The real point is, Whether there ſhall be contribution by ſureties in diſtinct obligations?

It is admitted, that if they had all joined in one bond, for 12,000 *l.* there muſt have been contribution (*a*). But this is ſaid to be on the foundation of contract implied from their being parties in the ſame engagement, and here the parties might be ſtrangers to each other. And it was ſtated that no man could be called upon to contribute who is not a ſurety on the face of the

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(*a*) See *Layer* v. *Nelſon*, 1 *Vern.* 456. where it was held, that where one obligor that is ſurety is ſued alone, by cuſtom of *London* he ſhall make his co-ſureties contribute. So where ſurety pays a debt and has no counterbond, by cuſtom of *London* he ſhall maintain action againſt the principal.

1800.

DEERING
v.
The Earl of
WINCHEL-
SEA, &c.

bond to which he is called to contribute. The point remains to be proved that contribution is founded on contract. If a view is taken of the caſes, it will appear that the bottom of contribution is a fixed principle of juſtice, and is not founded in contract (*a*). Contract indeed may qualify it as in *Swain* v. *Wall*, 1 *Ch. Rep.* 149. where three were bound for *H.* in an obligation, and agreed if *H.* failed to bear their reſpective parts. Two proved inſolvent, the third paid the money, and one of the others becoming ſolvent, he was compelled to pay a third only (*b*).

There are in the *Regiſter*, fo. 176. *b.* two writs of contribution, one, "*De contributione faciendâ inter cohæredes*," the other, "*De feoffamento*;" theſe are founded on the ſtatute of *Marlebridge*, 52 *H.* 3. *c.* 9. which enacts, "that if any inheritance whereof "but one ſuit is due deſcends unto many heirs as unto parceners, "whoſo hath the eldeſt part of the inheritance, ſhall do that one "ſuit for himſelf and fellows, and the other co-heirs ſhall be contributaries according to their portion for doing ſuch ſuit. And "if many feoffees be ſeized of an inheritance whereof but one "ſuit is due, the Lord of the fee ſhall have but that one ſuit and "ſhall not exact of the ſaid inheritance but that one ſuit as hath "been uſed to be done before. And if theſe feoffees have no "warrant or means which ought to acquit them then all the "feoffees according to their portion ſhall be contributaries for "doing the ſuit for them." The object of the ſtatute was to protect the inheritance from more than one ſuit. The proviſion for contribution was an application of a principle of juſtice. In *Fitzh. N. B.* 162. *B.* there is a writ of contribution where there are tenants in common of a mill and one of them will not repair the mill, the other ſhall have the writ to compel him to contribute to the repair. In the ſame page *Fitzherbert* takes notice of

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(*a*) On inqueſt of office a *ſci. fa.* iſſued to *M.* and *E.* his wife ter-tenants, who alleged that the father of *E.* was ſeized of the lands and other lands which deſcended to *E.* and *A.* now wife of *B.*, between whom purparty was made and the land in queſtion allotted to the purparty of *E.*, and ſo ſhe held the land in purparty for other lands allotted for the purparty of *A.* and prayed aid of *A.* which was granted, and *A.* came not, but *M.* and *E.* came; and on the matter judgment for the king and execution awarded, and that *M.* and *E.* ſhould have over *pro ratâ*, and as to the iſſues *M.* and *E.* his wife prayed, that as her parcener had taken the profits of other lands, ſhe ſhould be charged with iſſues *pro ratâ*, and accordingly judgment that *M.* and *E.* ſhould recover *pro ratâ*, 40 *Aſſ.* 24. See alſo *Dame Greſham's* caſe, *Moor*, 429. *Cro. Eliz.* 506. *S. C.* where by way of plea in abatement to a recognizance in chancery againſt ter-tenants, it was pleaded that the cognizor was ſeized of other lands *tempore recognitionis factæ*.

(*b*) But ſee *Peter* v. *Rich*, 1 *Ch. Rep.* 35. where two out of three ſureties were compelled to pay in moieties, the third being inſolvent.

the writs of contribution between co heirs and co-feoffees; and ſuppoſes that between feoffees the writ cannot be had without the agreement of all (*a*), and the writ in the regiſter (*b*) countenances the idea; yet this ſeems contrary to the expreſs proviſion in the ſtatute. In Sir *Wm. Harbet*'s caſe, 3 *Co.* 11. *b.* many caſes are put of contribution at common law. The reaſon is, they are all in *quali jure*, and as the law requires equality they ſhall equally bear the burthen. This is conſidered as founded in equity; contract is not mentioned. The principle operates more clearly in a court of Equity than at law. At law the party is driven to an *audita querela* or *ſcire facias* to defeat the execution and compel execution to be taken againſt all. There are more caſes of contribution in equity than at law. In *Equity Caſes Abridged* there is a ſtring under the title "Contribution and Average." Another caſe at law occurred in looking into *Hargrave's Tracts* in a treatiſe aſcribed to Lord *Hale* on the priſage of wines. The King's title is to one ton before the maſt and one ton behind the maſt. If there are different owners they may be compelled in the *Exchequer Chamber* to contribute (*c*). Contribution was conſidered as following the *accident* on a general principle of equity in the Court in which we are now ſitting.

In the particular caſe of ſureties, it is admitted that one ſurety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be becauſe they are jointly bound? What if they are jointly and ſeverally bound? What if ſeverally bound by the ſame or different inſtruments? In every one of thoſe caſes ſureties have a common intereſt and a common burthen. They are bound as effectually *quoad* contribution as if bound in one inſtrument, with this difference only, that the ſums in each inſtrument aſcertain the proportions, whereas if they were all joined in the ſame engagement they muſt all contribute equally.

(*a*) *Fitzherbert* ſeems only to ſay that if one of the feoffees does the ſuit voluntarily, he ſhall not have contribution; and the ſtatute ſeems not to have been conſtrued as having given the writ, but a remedy to prevent one being diſtrained for the whole. See 3 *Co.* 14. *b.* as to lands extended.

(*b*) Fo. 177. *et prædictus A. ſectam illam pro ſe et prædictis, B., C., D., et E. ex eorum aſſenſû facit, &c.*

(*c*) There being a charge on a manor for the repairs of bridges, and the whole levied on the lord, the Court of *Exchequer* on *Engliſh* bill for contribution, held that all thoſe who held any part of the demeſnes by purchaſe from the crown were liable to contribute. *Rich* v. *Barker*, *Hard.* 131. See alſo *Caſe de Lodden Bridge*, Sir *W. Jones*, 273. and the caſes collected from *Vin. Abr.* tit. *Contribution and Average*.

(*c*) *Hargrave's Law Tracts*, p. 120.

1800.

DEERING v. The Earl of WINCHELSEA, &c.

In this caſe Sir *E. Deering*, Lord *Winchelſea*, and Sir *J. Rous* were all bound that *Thomas Deering* ſhould account (*a*). At law all the bonds are forfeited. The balance due might have been ſo large as to take in all the bonds; but here the balance happens to be leſs than the penalty of one. Which ought to pay? He on whom the crown calls muſt pay to the crown; but as between themſelves they are *in æquali jure*, and ſhall contribute. This principle is carried a great way in the caſe of three or more ſureties in a joint obligation; one being inſolvent the third is obliged to contribute a full moiety. This circumſtance and the poſſibility of being made liable to the whole has probably produced ſeveral bonds. But this does not touch the principle of contribution where all are bound as ſureties for the ſame perſon.

There is an inſtance in the civil law of average, where part of a cargo is thrown overboard to ſave the veſſel, *Show. Parl. Caſ.* 19. *Moor*, 297. The maxim applied is *qui ſentit commodum ſentire debet et onus*. In the caſe of average there is no contract expreſs or implied, nor any privity in an ordinary ſenſe. This ſhews that contribution is founded on equality and eſtabliſhed by the law of all nations.

There is no difficulty in aſcertaining the proportions in which the parties ought to contribute. The penalties of the bonds aſcertain the proportions.

The decree pronounced was, that it being admitted by the Attorney General and all parties that the balance due was 3883*l.* 14*s.* 8½*d.* the Plaintiff Sir *E. Deering* and the Defendants the Earl of *Winchelſea* and Sir *J. Rous* ought to contribute in equal ſhares to the payment thereof, and that they do accordingly pay each 1294*l.* 11*s.* 6¼*d.* and on payment the Attorney General to acknowledge ſatisfaction on the record of the judgment againſt the Plaintiff and the two bonds entered into by the Earl of *Winchelſea* and Sir *J. Rous* to be delivered up.

This being a caſe which the Court conſidered as not favourable to Sir *E. Deering* and a caſe of difficulty, they did not think fit to give him coſts.

(*a*) See the clauſe in 33 *H.* 8. *c.* 39. *ſ.* 80 as to equal charging of lands liable to the king's debts. Sir *Thomas Cecil's* caſe, 7 *Co.* 20. *b.* *Primroſe* v. *Bromley*, 1 *Atk.* 89. and Sir *Dennis O'Carrel's* caſe, *Ambler*, 61.

(*b*) In the caſe of *Alan de Charleter*, *Trin.* 12 *Ed.* 2. *Rot.* 112. the barons of the *Exchequer* were commanded by writ to apportion among parceners a certain debt due from their anceſtor to the king. *Madox Hiſt. Exchequer*, 667.

Perkins Adminiſtrator *v.* Petit.

July 2d.

A *ſcire facias* againſt bail in error may be amended by the record of the recognizance.

A rule *Niſi* was obtained on a former day for leave to amend a *ſcire facias* againſt bail in error by the record of the recognizance; the amendment propoſed was the inſertion of the coſts of the verdict.

Shepherd Serjt. ſhewed cauſe and inſiſted that the Court would not allow this amendment (*a*), the effect of which might be to falſify the plea of *nul tiel record* though true when pleaded. *Buckſon* v. *Hoſkins*, *Salk.* 52. 2 *Lord Raym.* 1060. *S. C. Vavaſor* v. *Baile*, *Salk.* 52. *Hillier* v. *Froſt*, 1 *Str.* 401.; he admitted that two caſes are referred to in 2 *Lord Raym.* 1060. where it was allowed, but obſerved that there it was before plea pleaded.

Cockell Serjt. in ſupport of the rule relied on *Sweetland* v. *Beezley*, *Barnes*, 4. where the Court permitted a *ſcire facias* againſt bail to be amended after iſſue joined on *nul tiel record.* He obſerved, that though it had not been very uſual to allow ſuch an amendment as againſt bail to the original action, yet the reaſon on which it had been refuſed probably was that they might not thereby be prevented from ſurrendering the principal, whereas bail in error cannot ſurrender the principal, but muſt pay the debt.

The Court took till this day to conſider of the caſe, when Lord *Eldon* Ch. J. ſaid,—We have no doubt of the power of the Court to amend a *ſcire facias* againſt bail, but as it does not appear to have been the modern practice to permit amendments in caſes of this kind, we think the bail in this caſe ought not to be taken by ſurpriſe. At the ſame time we deſire that our refuſal to amend may not be drawn into precedent, ſince after this notice we ſhall not think ourſelves bound to abſtain from exerciſing the power of granting theſe amendments in future.

Per Curiam, Rule diſcharged.

(*a*) Vid. *Tidd's Pr. K. B.* 831. ed. 1. 1063. ed. 2. and 2 *Sellon's Pr. C. B.* 64. ed. 1798.

On the firſt day of this term Mr. Baron *Chambrè*, who had during the vacation been appointed to ſucceed Mr. Juſtice *Buller* in this Court, took his ſeat and the oaths.

1800.

Robert Graham of the *Inner Temple* Eſq. Attorney General to his Royal Highneſs the Prince of *Wales*, ſucceeded him in the Court of *Exchequer* and was knighted.

Arthur Onſlow of the *Middle Temple* Eſq. was called to the honourable degree of Serjeant at law in the courſe of this term. The motto on his rings and on thoſe of Mr. Baron *Graham* who was called to this degree at the ſame time, was, "*Et placitum læti componite fœdus.*"

THE END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS

IN

Michaelmas Term,

In the Forty-firſt Year of the Reign of GEORGE III.

1800.

WHITFIELD *v.* SAVAGE.

Nov. 7th.

THIS was an action for money had and received, which came on to be tried before Lord *Eldon* Ch. J. at the *Guildhall* ſittings after laſt *Trinity* term.

The circumſtances of the caſe were as follow: a perſon of the name of *Dibdin* being in want of 50 *l.* applied to the Plaintiff for the loan of that ſum, who gave him a bill for 55 *l.* 6 *s.* drawn by himſelf upon one *Thornton*, and accepted by the latter. *Thornton* had effects of the Plaintiff in his hands to the amount of the bill. *Dibdin* indorſed the bill to the Defendant from whom he received the full amount, and the Defendant indorſed it over, to another perſon. The day before the bill became due *Dibdin* took 50*l.* in part payment of his debt to the Plaintiff, but ſoon after he had paid it into his hands, the Plaintiff in the preſence of *Dibdin* being informed that *Thornton* the acceptor was become inſolvent,

A. with a view to accommodate *B.* lent him a bill drawn by himſelf upon and accepted by *C.* who had effects of his in his hands; *B.* indorſed it to *D.* who indorſed it over; the day before the bill became due *B.* paid the amount to *A.*, who on hearing that *C.* had failed gave *B.* a check for the amount of the bill and ſent him with it to *D.* to enable him to pay the bill when due; four days after that time *A.* learning that payment had not been demanded, deſired *D.* not to pay the bill, as no notice of non-payment had been given by the holder and offered to indemnify him; notwithſtanding this *D.* afterwards paid the bill; held, 1ſt, that *D.* paid the bill in his own wrong; 2dly, that *A.* was entitled to recover back the money paid into the hands of *D.* by *B.*, in an action for money had and received.

1800.

WHITFIELD *v.* SAVAGE.

ſaid, "that it would be of no uſe for him to keep *Libdin's* money as he ſhould not like the bill to be returned upon him;" he therefore gave to *Dibdin* a check on his banker for 50 *l.* (being the ſum which he had juſt before received of him) deſiring him to take it to the Defendant: *Dibdin* accordingly gave the check to the Defendant together with 5 *l.* 6 *s.* of his own, to enable him to provide for the bill, telling him that *Thornton* had become inſolvent, and was gone off. Four days after the bill had become due, the Plaintiff having learnt from the Defendant that payment of the bill had not been demanded, deſired him not to pay it as no notice had been given by the holder of its non-payment, and at the ſame time promiſed to indemnify the Defendant againſt the conſequences of a refuſal. Soon after this the bill was brought to the Defendant who paid it notwithſtanding the caution he had received from the Plaintiff; whereupon the latter brought this action to recover the 50 *l.* paid to the Defendant to enable him to provide for the bill. The jury found a verdict for the whole amount.

Shepherd Serjt. now moved for a rule to ſhew cauſe why this verdict ſhould not be ſet aſide and a nonſuit be entered; contending, 1ſt, that in this caſe the Plaintiff had waved his right to notice from the holder of non-payment by the acceptor; inaſmuch as he had depoſited the amount of the bill in the hands of the indorſer for the purpoſe of enabling him to diſcharge it, in contemplation of the inability of the acceptor ſo to do; that it was clear that the drawer might wave his right to notice, by promiſing the holder to pay the bill ſubſequent to the time of its becoming due; and for the ſame reaſon he might wave it by an antecedent promiſe, for that if the drawer do any thing from which the holder may infer that he does not mean to require notice, the notice is diſpenſed with; that it is not neceſſary that the *holder* ſhould give notice of non-payment by the acceptor, for the acceptor himſelf may do it; that a notice before the bill becomes due, that it will not be paid when due, is tantamount to a notice after the bill has become due, that it was not paid when due; and that the Plaintiff in this caſe before the bill became due was ſo fully ſatisfied that it would not be paid when due, that he depoſited the amount with the indorſer and thereby evinced that he did not require notice; that the indorſer thereby became a truſtee for the holder, and would not therefore have been juſtified in returning the money, for that when goods or money are depoſited by *A.* with *B.* for the benefit of *C.* upon

1800.

WHITFIELD *v.* SAVAGE.

upon a precedent conſideration, the depoſit is not revocable, though in caſes where the depoſit is made without a precedent conſideration it is; *Clark's* caſe, 2 *Leon*, 30, 31. *Dyer*, 49. and *Alderſon* v. *Temple*, 4 *Bur.* 2239. *Per* Lord *Manſfield*; 2dly, That this action could not be maintained by the preſent Plaintiff who had advanced nothing, the money paid into the hands of the Defendant being in fact the money of *Dibdin*; for the check for 50*l.* was nothing more than a return of the money previouſly paid by *Dibdin* to the Plaintiff, and was paid to the Defendant by *Dibdin's* hand.

Lord ELDON Ch. J. In this caſe the acceptor having had effects of the drawer in his hands, it muſt be taken as clear that notice of non-payment was *primâ facie* neceſſary. *Thornton* the acceptor was firſt liable, and in caſe of the Defendant being called upon as indorſer he had a right to call upon *Dibdin* the prior indorſer and upon the Plaintiff as drawer. Had *Dibdin* been really an indorſer only he would have had the ſame right to call upon the Plaintiff, but as the bill was given to him merely for his accommodation he had no ſuch claim. Notwithſtanding the inſolvency of the acceptor, the law required that if the bill were not paid when due, notice of non-payment ſhould be given. On the day before the bill became due the Plaintiff told *Dibdin* that from the nature of the acceptor's circumſtances there was reaſon to apprehend the bill might be returned upon him, and in order to prevent that from taking place deſired him to carry the check for 50*l.* to the Defendant. On that tranſaction, without more, it appeared to me impoſſible for the Defendant to contend that becauſe the Plaintiff put money into his hands *a priori* to pay the bill in caſe a due demand thereof ſhould be made; that he was therefore authorized to pay it whether a due demand ſhould be made or not: admitting however that the act of the Plaintiff in ſending the money before the bill became due amounted to an authority to pay whenever a demand ſhould be made, provided nothing intervened, yet as the Plaintiff before any demand had been made, and after the holder had been guilty of laches, expreſsly cautioned the Defendant not to apply the money in payment of the bill, it ſeems to me that the Defendant paid it in his own wrong. The object of the Plaintiff in putting the money into the Defendant's hands was to protect him in caſe the latter duly paid the bill, and he did this under an impreſſion that both the Defendant and himſelf were liable; but circumſtances having decided that neither were liable, he had a right to ſay that the money ſhould not be applied in payment of the bill and that it remained in the Defendant's hands for his own uſe. It has been argued from the caſe in *Burrow*, that if money be paid into the hands of *A.* for the uſe of *B.* on a precedent conſideration, that payment cannot be countermanded; and I agree to the truth of this propoſition, provided ſuch payment conſtitute *A.* a holder for the uſe of *B.* at all events. But in a caſe like this, where money is paid by the drawer into the hands of an indorſer, for the indemnity both of the indorſee and drawer, the queſtion is, Whether it be not paid for the uſe of the holder ſo long as he ſhall have a right to demand it, and when he has no longer any right to demand it, that is, when the holder has been guilty of laches, then for the uſe of the drawer? In the preſent inſtance, the Plaintiff not only cautioned the Defendant againſt paying the bill becauſe it was overdue without notice, but offered to indemnify the Defendant againſt the conſequence of conteſting the queſtion with the holder. Could then the holder have recovered either againſt the Plaintiff or Defendant? The acceptor having had effects of the drawer in his hands, and the inſolvency of the former not being ſufficient to diſpenſe with the neceſſity of notice, it is clear that he could not. With reſpect to the ſecond objection, that this action for money had and received ought to have been brought by *Dibdin* inſtead of the preſent Plaintiff, it appears to me that the action is well brought, for theſe reaſons. The night before the bill became due the Plaintiff ſent the money in diſpute to the Defendant; it was the Plaintiff therefore that advanced it. It is true indeed, that *Dibdin* being the perſon liable in conſcience before either the Plaintiff or Defendant, had previouſly put 50*l.* into the Plaintiff's hands; but as the money in diſpute was actually ſent by the Plaintiff to the Defendant, the former had a right to call upon the latter to reſtore it to him. As between the Plaintiff and Defendant the money may be conſidered as advanced by the Plaintiff: and in what manner the Plaintiff and *Dibdin* might ſettle between themſelves does not concern this Defendant. I ſhould think, as having actually advanced it, he had a right to recover it, even if after the recovery he held it as a truſtee for *Dibdin*. In contemplation of law the Plaintiff has loſt the value of his effects in the hands of the acceptor; and it is on that principle that notice of non-payment is required. In contemplation of law he muſt ultimately have been the loſer by the failure of the acceptor. He therefore depoſited the money with the Defendant to anſwer the bill if duly demanded. But when the holder was no longer entitled to enforce payment of the bill, the money ſo depoſited muſt be conſidered as remaining in the Defendant's hands for the uſe of the Plaintiff, and the Defendant having taken upon himſelf to diſpoſe of that money in payment of the bill, after notice to abſtain from ſo doing, and after an offer of indemnity, is in law liable to anſwer to the Plaintiff for the amount.

Heath and *Rooke* Js. (abſente *Chambre* J) concurring;

Shepherd took nothing by his motion.

WILSON *qui tam v.* GILBERT, Clerk.

Nov. 10th.

In an action for non-reſidence the pariſh was ſtyled in the declaration *Saint Ethelburg*; evidence that the real name was *Saint Ethelburga*; held a fatal variance.

THIS was an action for non-reſidence. In the Declaration the pariſh was deſcribed as *Saint Ethelburg*. At the trial evidence was given on the part of the Defendant to ſhew that the real name was *Saint Ethelburga*. Upon this *Chambre* J. before whom the cauſe was tried at the *Guildhall* ſittings after laſt *Trinity* term, nonſuited the Plaintiff.

Cockell Serjt. now moved to ſet that nonſuit aſide and have a new trial, contending that the names of *Saint Ethelburg* and *Saint Ethelburga* were the ſame; and that indeed the name in the declaration was ſufficiently well ſtated, inaſmuch as in *Maitland's Hiſt. of London* (*a*) the pariſh was ſtyled *Saint Ethelburg*, and in *Ecton's Theſaurus*, p. 333. *Saint Ethelburge*, which is *idem ſonans* with *Ethelburg*.

The Court obſerved, that *Saint Ethelburg*, and *Saint Ethelburga* might be diſtinct *Saints*, the one male and the other female; but that at any rate, the nonſuit, being right according to the evidence given at the trial, ought not now to be diſturbed; particularly in this kind of action.

Cockell took nothing by his motion.

(*a*) *Maitland* ſays that it was ſo called from being dedicated to *Ethelburge*, vol. 2. p. 1098. In *Stow's Survey of London*, by *Strype*, vol. 1. book 2. c. 6. p. 99. the church is called the pariſh church of *Saint Ethelburge*, virgin: but a table of benefactors to the church and poor of the pariſh of *Saint Ethelburga*, is there inſerted. In *Stow's Survey*, by *Seymour*, vol. 1. p. 361. book 2. c. 5. the pariſh is called *Saint Ethelburga*, and the church the pariſh church of *Saint Ethelburga*. But *Seymour* ſays that *Stow* himſelf calls the church the church of *Saint Ethelburgh*, virgin; which ſays *Seymour*, ſeems to be a miſtake, ſhe being a widow; but he does not notice the variance in the name. *Noorthouck*, in his *Hiſt. of London*, p. 557. ſtyles the church the church of *Saint Ethelburg*, ſo called from its dedication to *Ethelburga*. In *Bacon's Liber Regis*, p. 567. the name is *Saint Ethelburga*.

1800.

Nov. 11th.

Davies and Others, Aſſignees of Shivers a Bankrupt, *v.* Chippendale.

If a Defendant be holden to bail under a judge's order, a material fact being concealed from the judge, which would probably have induced him to refuſe the order, the Court will on application diſcharge the Defendant, even though there was a ſufficient affidavit of debt, independent of the order. But they will not diſcharge him from a detainer lodged againſt him by a third perſon while in cuſtody under the judge's order.

The Defendant in this caſe having been holden to bail under a judge's order for 5000 *l.* and upwards, at the ſuit of *Shivers* the Bankrupt on the 26th of *September* laſt, a detainer was lodged againſt him on the 8th of *November* following for 1300 *l.* at the ſuit of the Aſſignees.

On a former day in this term a rule *niſi* was obtained for diſcharging the Defendant from the original arreſt upon an affidavit, ſtating that a ſettlement of accounts had taken place between the Bankrupt and the Defendant, and that the former had given to the latter a receipt in full of all demands: and becauſe this circumſtance was not diſcloſed to the learned Judge at the time when the order was applied for, the Court made the rule abſolute for diſcharging the Defendant, though it was contended by *Bayley* Serjt. that the original affidavit of debt was ſufficient, independent of the order, and that no affidavit to contradict it could be admitted, for which the caſe of *Smith* v. *Fraſer*, 1 *Bl.* 192. was cited.

After this *Beſt* Serjt. obtained another rule *niſi* for diſcharging the Defendant from the detainer at the ſuit of the Aſſignees; and on this day contended, that as the order upon which the original arreſt was made had been diſcharged by the court, the Defendant never was legally in cuſtody under that arreſt, and that conſequently the detainer which was lodged againſt the Defendant while in ſuch illegal cuſtody could not be ſupported. He cited a caſe in 1 *Sellon's Pract.* p. 586. in the Appendix; ed. 1792, where a Defendant having been arreſted upon proceſs which had expired and detained by a continuance of the ſame proceſs, was diſcharged by the Court becauſe the original arreſt was illegal.

The Court were of opinion that the authority cited was not applicable to the caſe of a Plaintiff lodging a detainer againſt a Defendant in cuſtody at the ſuit of a ſtranger; that whatever might be the caſe with reſpect to the Plaintiff who made the original arreſt, it would occaſion extreme inconvenience if a third perſon were to be put under the neceſſity of examining into the validity of the cuſtody of the Defendant before he lodged his detainer; that the aſſignees of a bankrupt were to this purpoſe to be conſidered as ſtrangers to the original arreſt; and that independent of theſe conſiderations the original arreſt was not void ſince it was made under the order of a judge, which order was good at the time of the arreſt, though the Court for particular reaſons had ſince thought proper to diſcharge it.

Rule diſcharged.

Singleton and Others, Aſſignees of Howell, *v.* Butler.

Nov. 11th.

The acceptor of a bill of exchange two days before the expiration of the time for which the bill was originally drawn, called upon the indorſer and informed him privately that he was inſolvent; the indorſer inſiſted on being paid the amount of the bill, offering at the ſame time to become ſecurity to the creditors for ſo much as the eſtate ſhould produce, whereupon the acceptor paid it, and four days after became bankrupt; it alſo appeared that the bill had been altered ſo as to make it fall due before this tranſaction, but without the Defendant's knowledge. Held that this was ſufficient proof of fraudulent preference to defeat the payment of the bill.

This was an action for money had and received.

At the trial before Lord Eldon Ch. J. at the *Guildhall* ſittings after laſt *Trinity* term the following caſe was proved: The Defendant having drawn a bill of exchange on *Howell* the bankrupt, dated the 1ſt of *March* 1796, payable to his own order three months after date, it was accepted by *Howell*, and indorſed by the Defendant to his bankers. On the 2d of *June*, which was two days before the bill would become due as it was originally drawn, *Howell* came to the Defendant and told him that in conſequence of ſeveral houſes having failed he had loſt large ſums of money, and his bills had been returned upon him; and he informed the Defendant as his friend (but informed no other perſon thereof) that his affairs were bad, and would not pay above 10*s.* in the pound. Upon this the Defendant ſaid that *Howell* muſt pay his bill, and that if he would, he the Defendant would be ſecurity to *Howell*'s creditors for ſo much as the eſtate ſhould produce if they agreed to a compoſition. *Howell* accordingly paid the bill, and on the 5th of *June* became bankrupt. It alſo appeared that the date of the bill had been altered from the 1ſt to the 21ſt of *March*, and that the time of payment had been altered from three months after date to two months after date. There was no evidence however to ſhew by whom this alteration was made, or that the Defendant had any knowledge of it, but the circumſtances of the caſe rather afforded a preſumption that he did not. His Lordſhip obſerved to the jury that this was a bargain for a fraudulent preference, the conſideration of which was of no value; that the circumſtance of the bankrupt having called upon the Defendant two days before the bill became due, and after diſcloſing his ſituation having acceded to the Defendant's offer, afforded ſtrong ground for them to infer fraud, and that the inference of fraud as far as related to the bankrupt was rather ſtrengthened by the alteration which had taken place in the date

1800.

SINGLETON and Others *v.* BUTLER.

and time of payment of the bill. The jury found a verdict for the Plaintiffs for the amount of the money received by the Defendant on the bill.

Shepherd Serjt. now moved for a rule calling on the Plaintiffs to ſhew cauſe why there ſhould not be a new trial, contending that the preference given to the Defendant was not voluntary, inaſmuch as the Defendant had inſiſted on having the bill paid, and that it was not neceſſary there ſhould be any threats of legal proceſs to rebut the preſumption of fraudulent preference. He cited *Smith* v. *Payne*, 6 *T. R.* 152. where a ſecurity given to a creditor by a debtor at the mere inſtance of the former, but without any threats of an arreſt, was held valid, though the debtor himſelf informed the creditor of the bad ſituation of his affairs.

Lord ELDON Ch. J. having ſtated the caſe to the Court with his directions thereupon, declared himſelf of the ſame opinion which he gave at the trial, and diſtinguiſhed this from the caſe of *Smith* v. *Payne*, becauſe there the creditor came to the debtor, and the ſecurity was taken for a debt actually due.

Heath, *Rooke*, and *Chambre*, Js. concurring with his Lordſhip, *Shepherd* took nothing by his motion.

Nov. 11th.

MORRIS *v.* LANGDALE.

In a Declaration for ſlander the Plaintiff ſtated that he was a jobber or dealer in the funds, and as ſuch had been accuſtomed lawfully to contract; that the Defendant ſaid of him, as ſuch jobber or dealer, "He is a lame duck;" meaning that he had not fulfilled his contracts in reſpect of the ſaid ſtocks or funds; in conſequence of which divers perſons refuſed to fulfil their contracts with him, (ſpecifying the contracts,) and he was prevented from fulfilling his contracts with other perſons. Held, that it did not ſufficiently appear either that the words were ſpoken of lawful contracts, or that the Plaintiff was a lawful jobber or dealer in the funds; and that the declaration was therefore bad. *Qu.* Whether it can be ſtated as ſpecial damage that divers perſons refuſed to fulfil their contracts with the Plaintiff, ſince he might recover a compenſation by action, if the contracts were lawful.

ACTION on the caſe for defamation. The declaration ſtated, "that whereas at the time of ſpeaking and publiſhing the ſeveral falſe, ſcandalous, and malicious words hereinafter mentioned, the Plaintiff was and for a long time to wit &c. before then had been *a jobber or dealer in the public funds or ſecurities of this kingdom, commonly called the ſtocks*, to a great amount or value; and the Plaintiff had been for all that time as ſuch jobber or dealer in the ſaid funds or ſtocks as aforeſaid accuſtomed *lawfully to contract*, and had from time to time *lawfully contracted* with divers perſons for the purchaſe and ſale of divers ſhares and intereſts in the ſaid ſtocks or funds, to be delivered and transferred as well immediately as at future days from the times of making ſuch contracts, by means of which ſaid trafficking and exchanging of his property in the ſaid funds or ſtocks and other the ways and means aforeſaid he the ſaid Plaintiff had acquired and was daily from time to time acquiring great profits and emoluments to the comfortable ſupport of himſelf and his family, and to the great increaſe of his riches at *&c.* And whereas the ſaid Plaintiff had at all times conducted himſelf with great punctuality and fidelity in fulfilling his contracts relating to the ſaid public funds or ſtocks, and until the ſpeaking and publiſhing of the ſaid falſe ſcandalous and malicious words hereinafter mentioned, never had been inſolvent or was ſuſpected of inſolvency, or of not fulfilling or of not being able to fulfill his contracts and engagements as ſuch jobber or dealer in the ſaid ſtocks or funds or otherwiſe, to wit at *&c.* Nevertheleſs the ſaid Defendant well knowing the premiſes but falſely and maliciouſly deviſing, contriving, and intending to injure the ſaid Plaintiff in his good name, credit, and reputation, and alſo as ſuch jobber or dealer in the ſaid ſtocks or funds as aforeſaid, and to bring him the ſaid Plaintiff into great ſcandal, diſrepute, and miſtruſt amongſt all his neighbours and other the ſubjects of our ſaid Sovereign Lord the King, to whom he was known on *&c.* at *&c.* in a certain diſcourſe which the ſaid Plaintiff then there had at a certain place there called the *Stock Exchange*, the ſame being a place where brokers and jobbers in the ſaid ſtocks or funds uſually meet and tranſact their buſineſs, with one *Benjamin Maſon* of and concerning the ſaid *John*, as ſuch jobber or dealer in the ſaid ſtocks or funds as aforeſaid, falſely and maliciouſly ſaid, ſpoke, and publiſhed to the ſaid *Benjamin Maſon* in his preſence, and hearing of and concerning the ſaid Plaintiff as ſuch jobber or dealer in the ſaid ſtocks or funds as aforeſaid, theſe falſe, ſcandalous, and malicious words following (that is to ſay) "He (meaning the ſaid Plaintiff) is a lame duck (meaning that the ſaid Plaintiff had not fulfilled his contracts in reſpect of the ſaid ſtocks or funds).

There was another count which only varied from the above, by ſtating that the words were ſpoken in a converſation with divers other ſubjects of this realm; and that the words were "*Morris* is a lame duck (*a*)."

The declaration by way of ſpecial damage then averred that certain perſons (naming them) had refuſed to fulfil their contracts with the Plaintiff (ſpecifying the contracts) in conſequence of the words ſpoken. "By reaſon whereof the Plaintiff had not

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(*a*) The third and ſixth counts only are here ſtated, as none of the others came in queſtion upon this demurrer.

only loſt great gains which he would otherwiſe have acquired by the fulfilment of the ſaid contracts, but had alſo been greatly hindered from fulfilling his contracts made with divers other perſons in reſpect of the ſaid ſtocks or funds, and had been greatly embaraſſed in his ſaid employment, and had been for a long time to wit &c. prevented from following the ſame, by being in conſequence of the ſaid words publickly reported, announced, poſted, and conſidered at the ſaid *Stock Exchange* and elſewhere as a perſon unable to perform his contracts in regard to the ſaid ſtocks or funds, ſo that very many perſons to wit, (naming them) and others not only refuſed to fulfill their contracts in regard to the ſaid ſtocks or funds before then made with the Plaintiff, but alſo to have any farther dealings in the ſaid ſtocks or funds with him. By reaſon whereof the Plaintiff had loſt great ſums of money, &c. and had been put to great expence, &c. and was much injured in his credit and employment," &c.

To theſe counts the Defendant pleaded *actionem non* "becauſe the ſaid Plaintiff at the ſaid ſeveral times of ſpeaking and publiſhing the ſaid ſeveral ſuppoſed words in theſe counts mentioned had not fulfilled his contracts in reſpect of the ſaid ſtocks or funds. And this, &c. Wherefore," &c.

The Plaintiff demurred ſpecially to the above plea, "for that the ſaid Defendant hath not ſhewn or diſcloſed any particular contract or contracts of the ſaid Plaintiff in reſpect of the ſaid ſtocks or funds which the ſaid Plaintiff had not fulfilled as aforeſaid, nor hath the ſaid Defendant ſhewn or diſcloſed what ſuch contracts or contract were or was or with whom made or in what manner the ſame were or was broken by the ſaid Plaintiff, and alſo for that the ſaid Defendant hath not in or by his ſaid plea ſet forth any day time and place when or where the ſaid ſeveral facts alleged by him in that plea againſt the ſaid Plaintiff or any of them happened, and alſo for that the ſaid Defendant hath ſet forth the charges and allegations in that plea contained in ſo general and uncertain a manner that the ſaid Plaintiff cannot know what particular facts the ſaid Defendant will attempt to eſtabliſh by evidence on the trial of this cauſe, in ſupport of the matters alleged in the ſame plea; and therefore the ſaid Plaintiff cannot be prepared to diſprove or anſwer the ſame or ſafely take iſſue thereon, and for that the ſaid plea is in various other reſpects uncertain defective inſufficient and informal."

Shepherd Serjt. in ſupport of the demurrer, relied on *J'Anſon* v. *Stuart*, 1 *Term Rep.* 748. and *Newman* v. *Bayley* cited therein and alſo in 1 *William's Saunders*, 241. *in notis*, and obſerved that the rule laid down in *Underwood* v. *Parks*, 2 *Str.* 1200. that the truth of the words muſt be pleaded was expreſsly ſaid to be founded in this principle, that "the Plaintiff might come prepared to defend himſelf;" which principle would be utterly defeated if the truth of the words were allowed to be given in evidence under a plea ſo general as the preſent.

Clayton Serjt. *contrà*, obſerved, that if the Court ſhould determine that it was neceſſary for the Defendant to allege all the circumſtances of time and place, and the particular perſons with whom the contracts broken by the Plaintiff were made, it would introduce extreme prolixity on the pleadings; but he inſiſted that at all events the declaration was bad, for that the trade concerning which the Plaintiff complained that the words were ſpoken, had been declared illegal by the 7 *Geo.* 2. *c.* 8.; the title of which act is, "An act to prevent the infamous practice of ſtock-jobbing," and the preamble of which ſpeaks of the ſame trade as "the wicked pernicious and deſtructive practice of ſtock-jobbing"; that although it might be true that a perſon as a jobber in ſtocks might make certain contracts which were not illegal, yet as the act had treated ſtock-jobbing *eo nomine* as illegal, the plaintiff was bound to ſhew that the words in queſtion were ſpoken of ſuch contracts as were legal and might have been enforced; he alſo contended that the *innuendo* in the declaration which ſtated the words to mean "that the Plaintiff had not fulfilled *his contracts* in reſpect of the ſaid ſtocks or funds," was much too vague and general, and not warranted by the preceding *colloqium*, it being the province of an *innuendo* to explain only and not to enlarge. *Rex* v. *Greepe*, 2 *Salk.* 513.

Shepherd in reply argued, that it was clear from the very act of parliament which had been cited, that all jobbing in the funds was not illegal, ſince certain ſorts of ſtock-jobbing were recognized by the act itſelf, and that it could not therefore be neceſſary for the plaintiff to aver that the trade which he carried on was legal, for that the Court would not preſume that it was otherwiſe; that if it were neceſſary to make ſuch averment in the preſent caſe the Plaintiff had done it by ſtating that he as ſuch jobber had been accuſtomed lawfully to contract; that the *innuendo* which explained the words muſt alſo neceſſarily relate to lawful contracts, ſince the very word "contract" imports legality; that the words were alleged to be ſpoken of the Plaintiff *as ſuch jobber or dealer*, and it had

1800.

Morris v. Langdale.

had before been averred, that as ſuch jobber or dealer he was accuſtomed to make lawful contracts; and that with reſpect to the generality of the words "*his contracts*" as the object of an *innuendo* is only to explain the meaning of ambiguous words, and not to introduce any ſpecific allegation, if the meaning of the words to be explained be general, the *innuendo* muſt be general alſo.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord **Eldon**, Ch. J., who after ſtating the pleadings proceeded as follows—In ſupport of the demurrer to the plea it has been very ſtrongly argued, that in conſequence of its generality the Plaintiff muſt proceed to trial at the hazard of being able to produce evidence applicable to every contract which he ever made. The objection was then taken, that the Plaintiff had not ſtated a ſufficient cauſe of action. We are all of opinion, that the *innuendo* "meaning that the ſaid Plaintiff was incapable of fulfilling his contracts in reſpect of the ſaid ſtocks or funds" does not neceſſarily import that he was incapable of fulfilling his legal contracts, notwithſtanding the argument that the word "contract" *ex vi termini* imports legality. The declaration ſtates, that the plaintiff as a jobber or dealer in the public funds or ſtocks, had been accuſtomed lawfully to contract, but it is not averred what kind of jobber or dealer he was. We do not conſider a jobber or dealer in the funds as a known trader and having a character as ſuch. My Brother *Heath* has indeed removed from my mind the impreſſion which it had at firſt received, *viz.* that a jobber or dealer in the funds was always to be conſidered as a culpable perſon, by ſhewing the neceſſity of ſuch perſons for the accommodation of the market; yet that circumſtance will not obviate the objection that all the acts of parliament conſider ſtock-jobbers as of two ſpecies, *viz.* that which is called the infamous practice of ſtock-jobbing and that which is honeſt. The infamous practice is that in which a man enters into thoſe engagements reſpecting the public funds which are prohibited by the act of parliament. The honeſt practice is that in which a man engages for the purchaſe or ſale of ſtock whereof the vendor is poſſeſſed at the time. In this caſe no averment has been introduced diſtinguiſhing of which ſpecies the Plaintiff was. It is true that he has averred that as ſuch jobber or dealer he was accuſtomed lawfully to contract, but this amounts to no more than ſaying, that he had entered into ſome lawful contracts, and *non conſtat* that he may not as ſuch jobber or dealer have entered into ſome which were unlawful. It was contended, that engagements contrary to law are not contracts. I anſwer, that in the language of the act of parliament they are treated as contracts: and the act points out the diſtinction between contracts which are lawful and contracts which are unlawful. The *innuendo* therefore which explains the words "lame duck" to mean that the Plaintiff has not fulfilled his contracts, may apply equally to lawful or unlawful contracts; and conſequently no ſpecial damage can be ſaid to have ariſen from words which may import an accuſation that the Plaintiff has not done that which the law prohibits. Another doubt has ariſen in the mind of the Court, whether the ſpecial damage has been ſo laid as to ſupport the action, even ſuppoſing a jobber or dealer in the funds to be a known trader. A great part of the ſpecial damage conſiſts in an allegation that other perſons did not perform their lawful contracts with him. Now if the Plaintiff has ſuſtained any damage in conſequence of the refuſal of any perſons to perform their lawful contracts with him, it is damage which may be compenſated in actions brought by the Plaintiff againſt thoſe perſons: and the law ſuppoſes that in ſuch actions the Plaintiff would receive a full indemnity. Perhaps indeed that part of the declaration in which the Plaintiff complains, that he had been prevented from performing his contracts with other perſons, might be ſufficient to ſupport the action. Independent however of this latter conſideration reſpecting the defect in ſtating the ſpecial damage, we are of opinion that the third and ſixth counts of the declaration are bad.

The Court however gave leave to amend.

Doe on the Demiſe of John Planner and Catherine his Wiſe *v.* Scudamore.

Nov. 18th.

Deviſe to *G. L.* the teſtator's heir at law for life, and from and after his death to *C. B.* her heirs and aſſigns in caſe ſhe ſhall ſurvive and outlive the ſaid *G. L.* but not otherwiſe, and in caſe ſhe ſhall die in the lifetime of the ſaid *G. L.* then to *G. L.* his heirs and aſſigns for ever.—Held that the deviſe to *C. B.* was a contingent remainder; and barred by a recovery ſuffered by *G. L.*

This was an ejectment to recover the poſſeſſion of a meſſuage and lands deſcribed in the declaration, which came on to be tried at the laſt aſſizes for *Bedfordſhire*, when a verdict was found for the Plaintiffs ſubject to the opinion of the Court on a caſe in ſubſtance as follows.

Thomas Lane on the 9th of *March* 1792, by his will duly executed, deviſed as follows: "I give and deviſe my meſſuage or

1800.

Doe dem. Planner and Wiſe *v.* Scudamore.

tenement and farm called *Buckingham-hall* with the lands and appurtenances thereunto belonging and all other my real eſtate whatſoever ſituate lying and being in the pariſhes of *Higham Gobiais Pulloxhill* and *Barton* or elſewhere in the county of *Bedford* unto and to the uſe of my brother *George Lane* of the city of *Canterbury* and his aſſigns for and during the term of his natural life without impeachment of waſte, and from and immediately after his death then I give and deviſe the ſame unto and to the uſe of my amiable friend *Catherine Benger* (niece to Mrs. *Mary Shindler* of *Burgate-Street Canterbury* and who at this time lives with me and ſuperintends the management of my family) her heirs and aſſigns for ever in caſe ſhe the ſaid *Catherine Benger* ſhall ſurvive and outlive my ſaid brother but not otherwiſe; and in caſe the ſaid *Catherine Benger* ſhall die in the lifetime of my ſaid brother then and in ſuch caſe I give and deviſe my ſaid meſſuage farm lands and real eſtate in the ſaid county of *Bedford* unto and to the uſe of my brother *George Lane* his heirs and aſſigns for ever." In *March* 1793 the ſaid *Thomas Lane* died without having altered or revoked his ſaid will, leaving the ſaid *George Lane*, his brother, and heir at law, him ſurviving, who thereupon entered on the eſtate ſo deviſed, being the premiſes in queſtion. In *Trinity* term 1793 the ſaid *George Lane* levied a fine *ſur conuzance de droit come ceo, &c.* with proclamations of the premiſes in queſtion, and declared the uſe of the ſaid fine to himſelf in fee. On the 15th *December* 1796 the ſaid *George Lane*, by his will duly executed, deviſed the ſaid premiſes to *Edward Scudamore* the Defendant in fee; and in *November* 1799 the ſaid *George Lane* died in poſſeſſion of the premiſes, without having altered or revoked his ſaid will. On the 28th *May* 1798 the ſaid *Catherine Benger* made an actual entry upon the premiſes in queſtion, being within five years after the levying the ſaid fine, and for the purpoſe of avoiding the ſame. *Catherine Benger* afterwards married *John Planner*, and on the 17th of *January* 1800, before the bringing of this ejectment, the ſaid *John* and *Catherine Planner*, the leſſors of the Plaintiff, made an actual entry on the ſaid premiſes.

The queſtion for the opinion of the Court was, Whether the leſſors of the Plaintiff were intitled to recover? If they were, the verdict was to ſtand, but if not, a verdict to be entered for the Defendant.

Williams Serjt. for the leſſor of the Plaintiff. I contend that the fine levied by *George Lane*, the tenant for life, did not bar the eſtate deviſed to *Catherine Benger*. It may clearly be collected from the will, that it was the intention of the teſtator to give his eſtate to *C. Benger* in caſe ſhe ſurvived his brother; for it is not to be ſuppoſed that in limiting an eſtate for life to his brother, he could have intended to give him the power of defeating the immediate deviſe over to *C. Benger*. If therefore this intention be clear the Court will give it effect, provided that can be done without militating againſt any known rule of law. Now this intent may be effectuated either by conſidering the deviſe to *C. Benger* as a veſted remainder ſubject to be deveſted upon a condition ſubſequent; or by conſidering it as an executory deviſe. 1ſt, The words, "In caſe ſhe the ſaid *C. Benger* ſhall ſurvive and out-live my ſaid brother but not otherwiſe," may be conſidered as a condition ſubſequent. In *Sir John Robinſon* v. *Comyns*, *Caſ. temp. Talb.* 164. *R. Sheffield* deviſed his lands to the uſe of Defendant and his heirs in truſt for payment of his debts, and afterwards in truſt for his grand-daughter *Mary* (the Plaintiffs late wife) and the heirs of her body, remainder to the Defendant and his right heirs, upon condition that he ſhould marry the teſtator's grand-daughter. The grand-daughter refuſed to marry the Defendant, and having married the Plaintiff joined with her huſband in ſuffering a recovery of the premiſes. Lord Chancellor *Talbot* obſerved, that one queſtion was, Whether the condition annexed to the Defendant's remainder was a condition precedent or ſubſequent? and as to that he was inclined to think it a condition ſubſequent; ſaying, "There are no technical words to diſtinguiſh conditions precedent and ſubſequent; but the ſame words may indifferently make either, according to the intent of the perſon who creates it." The reaſoning of Lord *Talbot* applies ſtrongly to this caſe; and he collected the intent of the teſtator from the whole will. Here the intent of the teſtator to make the condition a condition ſubſequent very plainly appears. The limitation to *C. Benger* is immediate; and then follow the words by which the condition is created. Lord Ch. J. *Willes* in *Acherley* v. *Vernon*, *Willes* 156. obſerves, "I know of no words that either in a will or deed neceſſarily make a condition precedent: but the ſame words will either make a condition precedent or ſubſequent according to the nature of the thing and the intent of the parties." Provided the intent be clear the caſe of *Edwards* v. *Hammond*, 3 *Lev.* 132. may be cited to ſhew that a deviſe like the preſent may be conſtrued to be a veſted remainder, ſubject to be deveſted by a condition ſubſequent. In that caſe a copyholder ſurrendered to the uſe of himſelf for life, and afterwards to the uſe of his eldeſt ſon and his heirs, if he ſhould live to the age of twenty-one years, provided and on condition that if he ſhould die before twenty-one, that then it ſhould remain to the ſurrenderor and his heirs; and the Court held that it was an immediate ſurrender to the eldeſt ſon, ſubject to be defeated by condition ſubſequent, if he did not attain twenty-one; and compared the caſe to *Springe* v. *Cæſar*, Sir *W. Jones*, 389. 1 *Rol. Ab.* 415. *pl.* 12. where a fine was levied to the uſe of *A.* and his heirs, if *B.* did not pay him 10 *s.* on the 10th of *September*, and if *B.* did pay it, to the uſe of *A.* for life, remainder to *B.* and his heirs, and it was held that an eſtate in fee veſted immediately in *A.* ſubject to be deveſted by the payment afterwards. The words "and not otherwiſe" added at the end of the deviſe to *C. Benger* can ſcarcely be ſuppoſed to alter the nature of the condition, ſince they import nothing more than what might have been implied without them. It may be ſaid that if this doctrine be well founded it would have equally applied to the caſe of *Plunket* v. *Holmes*, 1 *Lev.* 11. Sir *T. Ray.* 28. S. C. (*a*) where the deviſe was to *Thomas* the eldeſt ſon for life, and if he died without iſſue living at the time of his death, to *Leonard* another ſon and his heirs, but if *Thomas* had iſſue living at his death that then the fee ſhould remain to the right heirs of *Thomas* for ever. But it may be obſerved that the condition upon which the eſtate to *Leonard* depended preceded the limitation of that eſtate, which eſtate could not be intended to veſt until the death of *Thomas* without iſſue, whereas in the preſent caſe an immediate eſtate is limited in terms to *C. Benger*, which eſtate is made by ſubſequent words to depend on a contingency that might well happen after the veſting of the eſtate. 2dly, Suppoſing that this deviſe is not to be conſidered as a veſted remainder with a condition ſubſequent, I contend that it may be conſtrued to be an executory deviſe. *G. Lane* the tenant for life, with the ultimate reverſion in fee, was the heir at law of the deviſor. The deviſe therefore is to be conſidered in the ſame light as if the deviſor had ſaid, "If *G. Lane* my heir at law ſhall die in the life of *C. Benger*, then I give an eſtate to *C. Benger* in fee"; which would unqueſtionably have created an executory deviſe in fee to *C. Benger*. It was a rule of law long before the caſe of *Plunket* v. *Holmes*, that a deviſe to the heir at law is void. *Counden* v. *Clerke*, *Hob.* 30. indeed it was ſo held at common law:

(*a*) 1 *Sid.* 47. S. C. 1 *Keb.* 29. 119. S. C.

for

Doe dem. Planner and Wife *v.* Scudamore.

for Lord *Bacon* ſays, " *Clauſula vel diſpoſitio inutilis* are ſaid when the act or the words do work or expreſs no more than the law by intendment would have ſupplied; and therefore the doubling or iterating of that and no more which the conceit of the law doth in a ſort prevent and pre-occupate is reputed nugation." *Bacon's Maxim's of the Law*, *Reg.* 21. And the rule has been held equally to apply to a deviſe of a reverſion as of an eſtate in poſſeſſion. Thus where a man deviſed land to his wife for life remainder to *J. S.* his next heir in fee, it was held that the heir ſhould be in of the reverſion by deſcent, and not of the remainder by deviſe. *Preſton* v. *Holmes*, 1 *Rol. Abr.* 626. (I) *pl.* 2. Suppoſe in this caſe that *C. Benger* had died in the lifetime of *G. Lane*, and the latter had been ſued on the bond of his anceſtor, is it poſſible to contend that he could have pleaded *riens per deſcent?* It is true that in this caſe there is a deviſe to *G. Lane* for life: but ſince the eſtate ſo deviſed is nothing more than *G. Lane* would have taken had no deviſe to him been made, the deviſe to him muſt be conſidered in law as void altogether; and the deviſe to *C. Benger* muſt be conſidered as if the preceding limitation to *G. Lane* were ſtruck out of the will. In this view of the caſe the deviſe to *C. Benger* would ſtand as a deviſe to her in fee in caſe ſhe ſurvived the teſtator's heir at law, which would be a clear executory deviſe. Where *A.* deviſed to his eldeſt ſon in fee, upon condition that if he paid not 20*l.* to the ſecond ſon and daughter, the land ſhould be to the ſecond ſon and daughter and their heirs, it was reſolved that " the firſt deviſe to the eldeſt ſon and his heirs, being no more than the law gives, is void; and it is but a future deviſe to the ſecond ſon and daughter upon the eldeſt ſon's default of payment: and the caſe is no other but as if one had deviſed that if his eldeſt ſon did not pay all legacies that his lands ſhould be to the legatees." *Haynſworth* v. *Pretty*, *Cro. Eliz.* 833. 919. It is further eſtabliſhed by the caſes of *Kent* v. *Harpoole*, 1 *Vent.* 306. *Pollexfen*, 92. S. C. Sir *T. Jones*, 76. S. C. (*a*) and *Hooker* v. *Hooker*, *Caſ. temp. Hardwicke*, 13. that if the ultimate reverſion in fee comes upon the tenant for life, the life eſtate is merged, and an eſtate in fee is immediately executed in him; the conſequence of which is that all contingent remainders depending on the eſtate for life are barred. Now as the reverſion in fee was deviſed to *G. Lane* as well as an eſtate for life, an eſtate in fee was executed in him immediately on the death of the deviſor; and it is clear that if *G. Lane* took a fee immediately on the death of the deviſor, the deviſe to *C. Benger* muſt have been

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(*a*) 3 *Keb.* 500. 731. S. C.

1800.

Doe dem. Planner and Wife v. Scudamore.

been an executory deviſe. In both the laſt-mentioned caſes *Lewis Bowles'* caſe, 11 *Co.* 79. was cited to ſhew that the life-eſtate and the reverſion in fee though united to certain purpoſes, might open upon the happening of the contingency, ſo as to let in the remainder; but the Court was of a contrary opinion: and indeed the doctrine in *Lewis Bowles'* caſe is not very intelligible. In the caſe of *Plunket* v. *Holmes* before referred to it is true the deviſe to *Leonard* was conſtrued to be a contingent remainder: as to which it muſt be obſerved, that this caſe ſtands alone oppoſed to all the above principles and authorities, and ſeems to have proceeded on the doctrine in *Lewis Bowles'* caſe; and it may be added, that the deciſion of *Plunket* v. *Holmes* has been much doubted by very great lawyers.

Bayley Serjt. *contrà* was ſtopped by the Court.

Lord Eldon Ch. J. There can be no doubt that if this be a contingent remainder it will have been deſtroyed by the operation of the fine, but if it be a veſted remainder or an executory deviſe no ſuch effect will have taken place. In my opinion the deviſe of the fee to *C. Benger* is contingent, and the deviſe of the fee to *G. Lane* is contingent alſo. This is not like the caſes laſt cited by my Brother *Williams*, particularly of *Hooker* v. *Hooker*; there the eſtate being limited to *A.* for life, and after his death to *B.* the heir at law of *A.* for life, and then without any eſtate to preſerve contingent remainders to the firſt and other ſons of *B.* in tail, reverſion to *A.* in fee, *A.* died, in conſequence of which the reverſion in fee, which was parcel of the inheritance, deſcended on *B.* and the queſtion was, Whether his life eſtate was thereby merged? The Court there held that it was merged, and that the contingent remainders never came into exiſtence, the particular eſtate on which they depended having determined before the contingency had taken place. If I underſtand the reaſoning on which the caſe of *Plunket* v. *Holmes* proceeds, it is this, that a particular eſtate was there given to the heir at law, which was an eſtate of freehold and not an eſtate in fee; and then an eſtate in fee was given upon a contingency to the ſecond ſon if it happened one way, and to the heir at law if it happened the other, which was a contingency applying to two ſeparate deviſes. That therefore was not like the caſe where the heir at law takes an eſtate in fee by expreſs deviſe or by executory deviſe inferred from a condition of which no one but himſelf can take advantage. In determining what was the intent of this teſtator we are not to take into conſideration that *G.*

Lane

1800.

Doe dem. Planner and Wife v. Scudamore.

Lane the heir at law had an eſtate independent of the effect of the will. The fee deviſed to *C. Benger*, and that deviſed to *G. Lane*, being both contingent, there was an eſtate ſomewhere not depending on a contingency; and that eſtate was in *G. Lane* as heir at law. In the caſe of *Plunket* v. *Holmes* the Court would not hold that the eſtate for life limited to the heir at law was merged by the ſubſequent limitation to him of a contingent remainder in fee; for that remainder was not executed. They held therefore that the eldeſt ſon took an eſtate for life; which eſtate for life being ſufficient to ſupport the remainder in fee to the ſecond ſon, and alſo the remainder in fee to the eldeſt ſon as contingent remainders, they determined that theſe limitations ſhould be ſupported as contingent remainders. The eſtate for life by which theſe contingent remainders were ſupported having been deſtroyed by the recovery before the contingency had taken effect, the contingent remainders were deſtroyed alſo; and the heir at law came in by virtue of that reverſion which deſcended to him independent of the will. With reſpect to the caſes which have been cited relative to conditions, I take it to be fully ſettled that a condition is to be conſtrued to be precedent or ſubſequent as the intent of the teſtator may require. But there is a wide difference between thoſe caſes in which this rule of law is to be applied to conditions, and thoſe in which we find a limitation preceded by an eſtate of freehold ſufficient to ſupport it as a contingent remainder. Lord *Kenyon* has laid it down, that where a limitation may be conſtrued as a contingent remainder, it ſhall not be conſidered as an executory deviſe (*a*): and that on principles of policy the Court is rather to ſuppoſe that the teſtator intended to give a contingent eſtate, than an eſtate upon condition. With reſpect to the caſe before Lord *Talbot* it is not applicable to this, for as the firſt eſtate was an equitable eſtate tail in poſſeſſion, a recovery ſuffered would have barred all remainders whatever, and conſequently all argument reſpecting the policy of conſtruing the ſubſequent limitation to be a veſted remainder on condition, a contingent remainder, or an executory deviſe was excluded. It was argued that the ſecond eſtate was a legal eſtate, and conſequently not barrable by a recovery of the equitable eſtate, but his Lordſhip only determined them both to be equitable eſtates, and the latter to be as well bound by the recovery as the former. In *Edwards* v. *Hammond*, it was matter of neceſſary implication that the eſtate ſhould

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(*a*) See *Doe* d. *Muſſel* v. *Morgan*, 3 *T. R.* 765.—See alſo *Pureſoy* v. *Rogers*, 2 *Saund.* 388.—And *Ives* v. *Legge*, 3 *T. R.* 489. *in notis*.

veſt in the eldeſt ſon during his infancy; for whatever might be the conſtruction of the prior words, it was clearly expreſſed that unleſs the ſon died before twenty-one the eſtates ſhould not remain to the ſurrenderor. So in *Haynſworth* v. *Pretty*, the proviſo to pay legacies was neceſſarily holden to create an executory deviſe to the legatees on failure of payment, becauſe if it had not been ſo, nobody but the eldeſt ſon could have taken advantage of the breach of the condition. I am not ſure whether there is not a claſs of caſes which decides that where an eſtate is given to a man for life, and from and after his death to another for life *in caſe he ſurvives*, the latter is not a contingent but a veſted remainder: for being an eſtate for life the enjoyment of that eſtate muſt neceſſarily depend upon the ſecond deviſee ſurviving the firſt, and therefore the words "in caſe he ſurvives" being in ſuch caſe neceſſarily included in the preceding words "from and after his death," they ſhall not convert a veſted into a contingent remainder (*a*). But here the ſecond eſtate is given in fee, and it is therefore impoſſible to argue from the duration of the eſtate, that in the preſent caſe the words "in caſe ſhe the ſaid *C. Benger* ſhall ſurvive and outlive my ſaid brother" are neceſſarily included in the preceding words "from and immediately after his death." With reſpect to the arguments which have been uſed to ſhew that the limitation to *C. Benger* is an executory deviſe, I take this diſtinction to be clearly ſettled, that where a fee is given to the firſt taker, and afterwards an eſtate in fee is limited to ſome other perſon, the Court will conſtrue the latter to be an executory deviſe, provided it be limited to take effect within the time preſcribed by the rules of law: but where a freehold only is given to the firſt taker and afterwards a fee is limited upon a contingency, the ſubſequent deviſe is in the nature of a remainder, and being capable of being ſupported by the precedent freehold eſtate as a contingent remainder, it ſhall not be deemed an executory deviſe. The argument of my Brother *Williams*, if admitted, would overthrow the practice of every day. For if an eſtate be deviſed to the eldeſt ſon for life, remainder to the firſt and other ſons of ſuch ſon in tail, without the interpoſition of truſtees to ſupport contingent remainders, remainder to the heirs of ſuch eldeſt ſon; it is clear that ſuch eldeſt ſon, though he be heir at law, takes an eſtate for his life, and if by fine or any other act he deſtroys ſuch life eſtate, the limitations to his firſt and other ſons will never take effect. The reſult of the caſe is this; the teſtator gives

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(*a*) See *Webb* v. *Hearing*, *Cro. Jac.* 415. alſo *Fearne's Contingent Remainders*, *p.* 367.

an eſtate for life to his brother, and if *C. Benger* ſurvives her brother he gives her an eſtate in fee; but on the contrary, if *C. Benger* does not ſurvive his brother he gives his brother an eſtate in fee. The brother being tenant for life, deſtroys his life eſtate before the contingency of ſurvivorſhip has taken place; conſequently the remainders depending thereon are deſtroyed, and the brother comes in as heir at law.

Heath J. I am of the ſame opinion. Two queſtions have been made in this caſe; firſt, Whether the condition be precedent or ſubſequent? Secondly, Whether the deviſe to *C. Benger* be a contingent remainder or executory deviſe? It has been truly ſaid, that there are no technical words by which a condition precedent is diſtinguiſhable from a condition ſubſequent; but that each caſe is to receive its own peculiar conſtruction according to the intent of the deviſor. The queſtion always is, Whether the thing is to happen before or after the eſtate is to veſt? If before, the condition is precedent; if after, it is ſubſequent. In this caſe it is clear that the event is to happen before the eſtate can veſt: for the brother is to die before *C. Benger* can be entitled to the eſtate, the words being "in caſe the ſaid *C. Benger* ſhall ſurvive and outlive my ſaid brother, and not otherwiſe." In all the caſes which have been cited to prove this a condition ſubſequent, the intent of the teſtator has been clear that the eſtate ſhould veſt immediately in poſſeſſion. Such was the caſe before Lord *Talbot*, and ſuch was the caſe of *Edwards* v. *Hammond*. This caſe therefore is diſtinguiſhable from the caſes cited, ſince in thoſe caſes the eſtate was not intended to veſt in poſſeſſion immediately. As to the ſecond queſtion, it has been decided ſo long ago that it will not admit of diſcuſſion. The caſe is not diſtinguiſhable from *Plunket* v. *Holmes*. Where a freehold is limited to the firſt taker and afterwards a fee is given on a condition, if it may take effect as a contingent remainder it ſhall do ſo; and it is not material that a fee might have deſcended to the firſt taker independent of the will.

Rooke J. I am of opinion that this is a contingent remainder, and I found that opinion on the caſe of *Plunket* v. *Holmes*. It was the intent of the teſtator that *G. Lane* ſhould take for life, and that after his deceaſe *C. Benger* ſhould take an eſtate in fee if ſhe ſurvived him, but if ſhe did not ſurvive him that *G. Lane* who was the heir at law ſhould take an eſtate in fee. Here therefore there was a particular eſtate for life, which was ſufficient to ſupport the deviſe over as a contingent remainder; and it is a ſettled rule of law that where the Court can conſtrue a deviſe to be a contingent remainder, they will never conſtrue it to be an executory deviſe.

Chambre J. I am of the ſame opinion. The caſe is perfectly clear both on reaſon and authorities.

Judgment for the Defendant.

Nov. 18th.

Garnham, Executrix, *v.* Hammond.

If a Plaintiff executor hold a Defendant to bail upon an affidavit ſtating the debt to be due, "as appears by the teſtator's books," but omitting to add, "and which the deponent believes to be true;" the Court of *C. B.* will allow the Plaintiff to ſwear to his belief in a ſupplemental affidavit.

The Plaintiff having held the Defendant to bail upon an affidavit, which ſtated that the Defendant was indebted to the Plaintiff in his character of executor, "as appeared by the teſtator's books;" a rule was obtained calling on the Plaintiff to ſhew cauſe why the Defendant ſhould not be diſcharged on entering a common appearance.

Cockell Serjt. now ſhewed cauſe, and urged that although the affidavit which had been made muſt be conſidered as inſufficient in its preſent form, for want of the words "and which the deponent believes to be true (*a*);" yet that, conſiſtently with the practice of this Court, a ſupplemental affidavit might be allowed in order to remove this objection; and cited *Roche* v. *Carey*, 2 *Bl.* 850. as preciſely in point (*b*).

Beſt Serjt. on the other ſide inſiſted that a ſupplemental affidavit could never be allowed except for the purpoſe of explaining an ambiguity in the original affidavit for the ſatisfaction of the Court: and referred to *Green* v. *Redſhaw*, *ante*, vol. 1. p. 227. where *Eyre* Ch. J. ſaid, "If it were allowed in this caſe, it would be making that right which was wrong at the time when it was done, and would be in the nature of an amendment" (*c*).

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(*a*) See *Bartlay* v. *Hunt*, 4 *Burr.* 1992. *Sheldon* v. *Baker*, 1 *T. R.* 83. and *Swayne* v. *Grammond*, 4 *T. R.* 176.

(*b*) See alſo *Hobſon* v. *Campbell*, 1 *H. Bl.* 245. where the Plaintiff after ſtating in his affidavit to hold to bail, a bond of the Defendant conditioned for payment of bills which ſhould be returned from *India* proteſted for *non-payment*, alleged that certain bills were returned proteſted for *non-acceptance*; and the Court held that the defect might be remedied by a ſupplemental affidavit.

(*c*) In *Reeks* v. *Groneman*, 2 *Wilſ.* 224. *C. B.* where the Plaintiff's affidavit had ſtated that the Defendant "*in* juſtly indebted," inſtead of "*is* juſtly indebted," and a ſupplemental affidavit was produced, the point was much debated, Lord Ch. J. *Pratt* and *Bathurſt* J. at firſt inclining to allow it, but *Clive* and *Gould* Js. oppoſing it, becauſe as the firſt was no oath at all, it could not be

made

The Court gave leave to the Plaintiff to file a ſupplemental affidavit.

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made good by any ſupplemental affidavit. Afterwards the caſe being argued a ſecond time, the ſupplemental affidavit was refuſed, Lord Ch. J. *Pratt* adopting the opinion of *Clive* and *Gould* Js. and ſaying that the Court "had never gone ſo far as to admit a ſupplemental affidavit, where the firſt amounted to no oath all, but had only ſupplied ſmall defects in affidavits which had not been quite full enough." *Bathurſt* J. retained his former opinion.

HOSIER *v.* SEARLE.

Nov. 18th.

Debt on bond conditioned for the performance by *R. G.* of all the covenants on his part mentioned in a certain indenture, bearing even date with the bond, made or expreſſed to be made between the Plaintiff and the ſaid *R. G.* Plea that before the execution of the bond it was agreed that the Plaintiff ſhould grant to *R. G.* a leaſe under certain covenants, and that the Defendant ſhould enter into a bond as ſurety for the performance of thoſe covenants; that the Defendant did accordingly enter into the bond on which the action was brought, and that the indenture mentioned in the condition thereof is the leaſe ſo agreed upon and no other; but that the ſaid leaſe never was executed. Held on demurrer that the Defendant was eſtopped by the condition of the bond from pleading this plea.

DEBT on bond.

The Defendant prayed oyer of the bond, which appeared to be a joint and ſeveral bond of *R. Gilder*, the Defendant, and one *Robert Kent*, the condition of which was, "that if the above bounden *R. Gilder* his executors adminiſtrators and aſſigns do and ſhall well and truly pay obſerve perform fulfil and keep the rent and all and ſingular the payments covenants articles clauſes and agreements whatſoever which on the part and behalf of the ſaid *R. Gilder* his executors adminiſtrators or aſſigns are and ought to be paid obſerved performed fulfilled and kept compriſed or mentioned in a certain indenture, bearing even date with the ſaid obligation, made or expreſſed to be made between *J. Hoſier J. Carter* &c. thirteen of the truſtees appointed to put in execution an act of parliament made &c and entitled &c of the one part, and the ſaid *R. Gilder* of the other part, in all things according to the true intent and meaning of the ſame; then the above written obligation ſhall be void otherwiſe the ſame ſhall remain in full force." He then pleaded, firſt, *non eſt factum*; ſecondly, "that before the making of the ſaid writing obligatory in the ſaid declaration mentioned, to wit, on the day of the date of the ſaid writing obligatory at, &c. it was agreed by and between the ſaid Plaintiff as one of the truſtees for putting in execution the ſaid ſeveral acts of parliament in the ſaid condition of the ſaid writing obligatory mentioned, and the ſaid *Robert Gilder* in the ſaid condition alſo named, that a certain indenture of leaſe ſhould be made and granted to the ſaid *Robert Gilder* by a competent number of the ſaid truſtees of certain tolls and duties in the ſaid acts mentioned for a certain term of years, at and, under a certain rent and upon and ſubject to certain covenants to be reſpectively reſerved and contained in the ſaid leaſe; and that the ſaid *Robert Gilder* and the Defendant and the ſaid *Robert Kent* in the ſaid writing obligatory mentioned, as his ſureties ſhould make and execute the ſaid writing obligatory in the ſaid Declaration mentioned, by way of ſecurity for the payment of the ſaid rent and the performance of the covenants to be mentioned in the ſaid intended leaſe; and the ſaid Defendant in fact further ſaith, that the ſaid agreement being ſo made as aforeſaid, he the ſaid Defendant and the ſaid *Robert Kent* as ſuch ſureties as aforeſaid, of and for the ſaid *Robert Gilder* in purſuance and performance of the ſaid agreement and on no other account and for no other conſideration whatſoever, afterwards to wit, on the ſame day and year in the ſaid declaration mentioned, made and executed the ſaid writing obligatory in the ſaid declaration mentioned with ſuch condition as aforeſaid thereto ſubjoined; and the ſaid Defendant in fact further ſaith, that the ſaid indenture in the ſaid condition mentioned was and is the very ſame indenture which was ſo agreed to be made and granted unto the ſaid *Robert Gilder* as aforeſaid and no other or different indenture; and that although ſuch indenture was and is in manner aforeſaid in the ſaid condition alleged to have been made, yet in truth and in fact no ſuch indenture nor any other leaſe whatſoever of the aforeſaid tolls and duties before or at the time of making the ſaid writing obligatory had been or was nor hath as yet been made or executed by and between the ſaid ſeveral truſtees in the ſaid condition of the ſaid writing obligatory named, or any other of the truſtees for putting in execution the aforeſaid acts of parliament of the one part, and the ſaid *Robert Gilder* of the other part; nor hath the ſaid *Robert Gilder* as yet executed or accepted any ſuch leaſe or entered into or executed the ſaid writing obligatory, and this, &c. wherefore," &c. 3dly, "That no ſuch indenture as was and is in the ſaid condition of the ſaid writing obligatory alleged to have been made, was or hath been as yet made or executed as was and is by the ſaid condition above ſuppoſed, and this, &c. wherefore," &c.

The Plaintiff joined iſſue on the firſt plea, and demurred generally to the two laſt.

Shepherd Serjt. in ſupport of the demurrer. The Defendant is eſtopped by the condition of his bond from averring that no ſuch indenture was executed as that referred to in the condition; the

1800.
HOSIER
v.
SEARLE.

the diſtinction eſtabliſhed by the courſe of authorities being this, *viz.* that where the condition refers to a generality, the party may aver that the matter referred to does not exiſt, but were it refers to a preciſe thing as in exiſtence at the time of the bond given, the obligor is eſtopped from denying its exiſtence; thus where a bond was conditioned to pay all the legacies which *J. S.* had deviſed by his will, the Court held that the Defendant was eſtopped from ſaying that *J. S.* made no will, but that he might ſay that *J. S.* gave no legacies by his will, *Paramoure* v. *During*, *Moor*, 420.; to the ſame effect is *Willoughby* v. *Brook*, *Cro. Eliz.* 556. where the Court ſay, if a man be obliged to perform the covenants in an indenture on his part to be performed, it is not any plea to ſay there were not any covenants therein to be performed; ſo in *Jewel's* caſe, 1 *Rolle Rep.* 408. 1 *Rol. Abr.* 872. *l.* 30. *Rainsford* v. *Smith*, *Dy.* 196. and *Hart* v. *Bulkminſter*, *Sty.* 103. But in *King* v. *Perſeval*, 1 *Rolle Rep.* 430. 1 *Rol. Abr.* 872. *l.* 25. the condition being to perform all the agreements already ſet down by *J. S*, the Defendant was allowed to plead that no agreement was made becauſe it was in the generality; and the ſame diſtinction was recognized in *Strowd* v. *Willis*, *Cro. Eliz.* 362. and *Paine* v. *Shettroppe*, *All.* 13. Theſe caſes were reviewed and the doctrine confirmed in *Shelley* v. *Wright*, *Willes*, 9. and *Coſſens* v. *Coſſens*, *Willes*, 25.

Marſhall Serjt. *contrà.* Admitting the propoſition that where the condition of a bond recites an actually exiſting indenture, the obligor cannot deny that indenture, yet unleſs it appear on the face of the condition that ſuch an indenture did actually exiſt, the Court will not ſupport this demurrer in favour of an eſtoppel; for "eſtoppels are odious in law and admitted merely out of neceſſity, becauſe they are concluding to ſpeak the truth," *Skipwoth* v. *Green*, 8 *Mod.* 312. The words of this condition only import, that if ſuch an indenture be made and the Defendant ſhall keep the covenants therein, the bond ſhall be void; but *non conſtat* that the leaſe was not to have been executed after the execution of the bond on the ſame day, in which caſe if the obligor had refuſed to execute the leaſe it would have been impoſſible to perform the condition of the bond. Now though he might be eſtopped from ſaying that there was no ſuch deed, yet it appears from *Skipwith* v. *Steed*, *Cro. Eliz.* 769. that he was at liberty to plead that he had never executed ſuch a deed. In that caſe the

Defendant to debt on bond conditioned for the performance of covenants in an indenture between *W. S.* and *Anne* his wife on the one part, and the Plaintiff on the other part, pleaded the indenture as an indenture of *W. S.* and *Anne* his wife, whereas the feme never ſealed it; the Plaintiff therefore replied *non fuit facta* between *W. S.* and *Anne* his wife on the one part and himſelf on the other, and it was found for him by the jury; and the Court held that the Plaintiff was not eſtopped from ſhewing the deed not to be the deed of baron and feme, but that he was eſtopped to ſay there was not any ſuch indenture. 2dly, Since the 8 & 9 of *W.* 3. *c.* 11. *ſ.* 8. is compulſory upon a Plaintiff in a caſe like this to ſuggeſt breaches upon the roll (*a*), until which he can have no remedy upon the bond, and ſince it is impoſſible to ſuggeſt breaches of covenants never entered into, the Court will not pronounce a judgment for the Plaintiff from which he can derive no advantage.

Lord **ELDON** Ch. J. ſaid, the preſent opinion of the Court is, that the Defendant is eſtopped by the condition of the bond. In addition to the arguments at the bar it may be obſerved, that the condition of the bond is for the performance of covenants compriſed in a certain indenture *made or expreſſed to be made* between the truſtees and the Defendant. The object of introducing the words "made or expreſſed to be made" ſeems to have been, that whether the execution of the indenture could be proved or not, the covenants contained in the paper writing which purported to be an indenture between the truſtees and the Defendant ſhould be conſidered as the covenants of the Defendant.

The Court having taken time to conſider, on this day, gave Judgment for the Plaintiff.

(*a*) *Drage* v. *Brand*, 2 *Wilſ.* 377. *Goodwin* v. *Crawle*, *Cowp.* 357. *Roles* v. *Roſewell*, 5 *T. R.* 538. and *Hardy* v. *Bern*, cit. 5 *T. R.* 540.

Nov. 22d.

TIPPING *v.* JOHNSON.

To a replication of *nul tiel record* and day given, if the Defendant demur, the Plaintiff need not join in demurrer; but if the record is not produced, may ſign judgment.

THE Defendant in this caſe having pleaded judgment recovered, the Plaintiff replied *nul tiel record* and gave a day to produce the record. To this plea the Defendant demurred; the Plaintiff did not join in demurrer, but finding that the record was not produced at the day, ſigned judgment.

A rule having been obtained by *Cockell* Serjt. calling on the Plaintiff to ſhew cauſe why this judgment ſhould not be ſet aſide for irregularity,

Shepherd Serjt. ſhewed cauſe, and inſiſted that where the Plaintiff replies *nul tiel record* and gives a day (*a*), it makes a complete iſſue; and that the demurrer was therefore improperly put in by the Defendant.

Lord ELDON Ch. J. (after referring to the officers) ſaid, that the replication conſtituted a complete iſſue of fact, and that the judgment was therefore regular.

Per Curiam, Rule diſcharged (*b*).

(*a*) This ſeems the proper method of concluding the replication where the record is of the ſame count. *Cremer* v. *Wickett*, 1 *Ld. Raym.* 550. *Carth.* 517. S.C. Where the record is of another court, it has been held correct to conclude with a verification; though it appears that either way will do. *Cremer* v. *Wicket*, *ubi ſuprà*. *Sanford* v. *Rogers*, 2 *Wilſ.* 113. *Barnes* 161. ed. 1798. and *Newberry* v. *Strudwick*, *Barnes*, 161. and 335. *Com.* 533, S. C.

(*b*) See *Fox and others* v. *Lewing*. *Cooke Caſ. Pr.* 56. *Pr. Reg.* 227. and the caſes cited in the preceding note.

THOMPSON *v.* Lady LAWLEY and Others.

Nov. 24th.

Under a general deviſe of all manors meſſuages lands tenements and hereditament, leaſehold meſſuages will not paſs, unleſs it appear to have been the evident intent of the deviſor that they ſhould paſs.

THIS was a caſe ſent by the Lord Chancellor for the opinion of this Court.

Bielby Thompſon Eſq. being ſeiſed in fee of the manor of *Wheldrake* in the county of *York*, and other real eſtates, and alſo poſſeſſed of a conſiderable perſonal eſtate, including among other things, two leaſehold houſes one ſituate at *Putney* in *Surry* and the other in *Mortimer Street Cavendiſh-Square*, holden on beneficial leaſes (in each of which about 70 years were unexpired (*a*),) on the 28th *May* 1794 duly made his will, atteſted ſo as to paſs real eſtates. After directing that his funeral expences debts and legacies ſhould be paid out of his perſonal eſtate, but if his perſonal eſtate ſhould not be ſufficient to pay the ſame his real eſtate ſhould be charged with the deficiency, he gave and deviſed his manor of *Wheldrake* and all other his manors meſſuages lands tenements and hereditaments to truſtees therein named and their heirs to the uſes upon and for the truſts intents and purpoſes therein mentioned, that is to ſay, as to his ſaid manor of *Wheldrake* and all his other tenements and hereditaments in the pariſh of *Wheldrake* to the intent that his

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(*a*) This fact was admitted though not ſtated in the caſe and indeed as the whole will was taken as part of the caſe though many parts relied upon in the judgment were not introduced at firſt, they are now added.

1800.

THOMPSON *v.* LACY LAWLEY and Others.

wife ſhould receive thereout during her life the yearly ſum of 200*l.* in addition to the yearly ſum of 800*l.* provided for her by his marriage ſettlement, and that certain other perſons therein named ſhould receive the annuities thereby provided for them, and he then deviſed as follows, that is to ſay "as for and concerning the ſaid manors meſſuages and other hereditaments ſo charged with the ſaid annuities with all their rights members and appurtenances and as for and concerning all other his manors meſſuages lands tenements and hereditaments with their rights members and appurtenances in the ſaid county of *York* or elſewhere in the kingdom of *Great Britain*, to the uſe of his firſt and other ſons in tail male and for want of ſuch iſſue to the uſe of his firſt and other ſons in tail general remainder to his daughters in tail as tenants in common if more than one, with croſs remainders, and for want of ſuch iſſue to the uſe of his brother *Richard Thompſon* and his aſſigns for his life without impeachment of waſte, remainder to the ſaid truſtees to preſerve contingent remainders, remainder to the uſe of the firſt and other ſons of the ſaid *Richard Thompſon* ſucceſſively in tail male, remainder to the uſe of *Paul Beilby Lawley* the third ſon of his ſiſter Lady *Lawley* for life, remainder to his firſt and other ſons in tail male, remainder to the uſe of *Francis Lawley* the ſecond ſon of his ſaid ſiſter for life, remainder to his firſt and other ſons in tail male, remainder to the uſe of Sir *Robert Lawley* the eldeſt ſon of his ſaid ſiſter for life, remainder to his firſt and other ſons in tail male, with the ultimate remainder to his own right heirs." Then followed a proviſo, that if *P. B. Lawley* or *F. Lawley* ſhould ſucceed to the premiſes they ſhould take the name and arms of *Thompſon* and other proviſoes empowering the ſeveral deviſees to jointure and to raiſe portions by demiſe or mortgage redeemable by the perſon who for the time being ſhould be intitled to the freehold and inheritance. He then limited an eſtate in *Nottinghamſhire* to other perſons and after having declared that it was his intention to have given his wife the choice of any one of his manſion-houſes in *Yorkſhire* or *London*, or the houſe that he had lately purchaſed at *Putney*, but that ſhe had declined the acceptance of either of them, and would have no houſe of her own to go to after his deceaſe, gave her therefore 5000*l.* He then, after giving ſeveral legacies, expreſſed himſelf as follows, "Laſtly, I give and bequeath all my monies ſecurities for money goods chattels and effects and all other my perſonal eſtate not herein before by me diſpoſed of, or to be diſpoſed of by any codicil or codicils to this

1800.
THOMPSON
v.
Lady
LAWLEY
and Others.

my will unto my ſaid brother *Richard Thompſon* and unto my ſiſter Lady *Lawley* in equal ſhares and proportions:" and he appointed his ſaid brother and ſiſter executor and executrix of his will.—The teſtator died on the 10th *June* 1799, without having revoked his will. The queſtion for the opinion of the Court was, Whether the leaſehold houſes and premiſes late belonging to the teſtator in *Mortimer-Street Cavendiſh-Square*, and at *Putney* in *Surry* paſſed by his will under the general deviſe of all his manors meſſuages lands tenements and hereditaments with their rights members and appurtenances in the county of *York* or elſewhere in the Kingdom of *Great Britain*?

Bayley Serjt. for the Plaintiff. In the firſt place the leaſehold property can only paſs by way of executory deviſe, and being limited after an indefinite failure of iſſue, the limitation as an executory deviſe is too remote. Independent of this conſideration, however, it may be ſtated as a general propoſition, eſtabliſhed by a long ſeries of caſes, that where a man is poſſeſſed of freehold and leaſehold property, the leaſehold will not paſs by a general deviſe applicable to freehold, unleſs an intention that they ſhould paſs can be collected from the face of the will, or from the nature of the leaſeholds themſelves. It was reſolved in *Roſe* v. *Bartlett*, *Cro. Car.* 292. "that if a man hath lands in fee, and lands for years, and deviſeth all his lands and tenements, the fee-ſimple lands paſs only and not the leaſe for years: and if a man hath a leaſe for years and no fee ſimple, and deviſeth all his lands and tenements, the leaſe for years paſſeth; for otherwiſe the will ſhould be merely void" (*a*). This caſe is a leading authority, and the doctrine has been recognized in a variety of ſubſequent deciſions. The caſe of *Davis* v. *Gibbs*, where the ſame propoſition was adopted, was firſt decided at the Rolls, as appears from *Fitzg.* 116. and that deciſion was afterwards confirmed by the Lord Chancellor, and on appeal from him, by the Houſe of Lords. 3 *P. Wms.* 26. The words uſed in that caſe were particularly ſtrong, being "manors meſſuages lands tenements hereditaments and real eſtates whatſoever of which the teſtatrix was any ways *ſeiſed or entitled to*", which laſt expreſſion might ſeem to apply to leaſehold eſtate. Lord *Hardwicke* in *Knotsford* v. *Gardiner*, 2 *Atk.* 450. cites the caſe of *Roſe* v. *Bartlett*, and adds, that although in the caſe before him he had no doubt at all of the intention of the teſtator, yet the rule of law muſt prevail, and directed an iſſue to try whether the teſtator at the time of making his will had both freehold and leaſe-

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(*a*) Indeed leaſehold houſes will paſs under a deviſe of all the teſtator's *freehold* houſes in *A.* if he had no leaſehold houſes. *Day* v. *Trigg*, 1 *P. Wms.* 286.

1800.

THOMPSON v. Lady LAWLEY and Others.

hold eſtates. The opinion of Lord *Hardwicke* reſpecting this rule of law is ſhewn ſtill more ſtrongly in *Chapman* v. *Hart*, 1 *Vez.* 271. for the will in that caſe having been executed in the preſence of two witneſſes only could not paſs the real eſtate, and yet his Lordſhip held that the deviſe of all his lands and tenements muſt, according to *Roſe* v. *Bartlett*, be confined to the freehold eſtates, and that therefore the leaſehold would not paſs. Theſe caſes are confirmed by *Piſtol* v. *Riccardſon*, *K. B. Hil.* 1784. 2 *Cox's P. Wms.* 459. *n.* 1. 1 *H. Bl.* 26. *in notis*, S. C. where Lord *Mansfield* obſerved, that a ſyſtem of legal conſtruction had been eſtabliſhed by former caſes, eſpecially *Roſe* v. *Bartlett*, and *Davis* v. *Gibbs*, which precluded the Court from conſidering the intention of the teſtator on the words of the deviſe as they otherwiſe might have done, and bound them in their deciſion of the principal caſe. Yet in that deviſe the words "ſeiſed of intereſted in or intitled unto" might ſeem applicable to leaſehold as well as freehold property. It was indeed lamented by Lord *Kenyon* in *Lane* v. *Lord Stanhope*, 6 *Term Rep.* 353. that the caſe of *Addis* v. *Clement*, 2 *P. Wms.* 456. was not cited in *Piſtol* v. *Riccardſon*, ſince his Lordſhip ſeemed to think that Lord *Manſfield* might have been induced by the authority of that caſe to have decided otherwiſe. But it appears from a manuſcript note of *Piſtol* v. *Riccardſon*, that the caſe of *Turner* v. *Huſter* (*a*), which proceeded on the authority of *Addis* v. *Clement*, was noticed by Lord *Manſfield* in his judgment, who received his account of it it from Mr. Baron *Eyre*: it is therefore to be inferred, that the caſe of *Addis* v. *Clement*, had it been cited, would not have altered his Lordſhip's opinion. It is to be obſerved, however, that the caſe of *Addis* v. *Clement* is very diſtinguiſhable from the preſent. Lord Chancellor *King* obſerved, that the words "poſſeſſed of or intereſted in" properly referred to a leaſehold, and expreſsly diſtinguiſhed the caſe before him from *Roſe* v. *Bartlett* on that ground; and his Lordſhip further relied on the circumſtance of the leaſeholds being perpetually renewable, which he thought might have induced the teſtator to look upon himſelf as having a kind of inheritance. This laſt circumſtance alſo diſtinguiſhes *Turner* v. *Huſter* from the preſent caſe; for there the leaſehold tithes were perpetually renewable without fine, and Mr. Baron *Eyre*'s opinion appears to have been founded on the ground of the teſtator's intention to paſs the leaſehold, inferring that the reſemblance which thoſe particular leaſeholds bore to an inheritance made the teſtator forget the diſtinction. With reſpect to *Lane* v. *Lord Stanhope* it might be ſufficient to ſay, that the word "farm"

(*a*) Reported 1 *Bro. Cha. Caſ.* 78.

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1800.

Thompson
v.
Lady
Lawley
and Others.

there uſed, was particularly deſcriptive of leaſehold property, if it was not clearly diſtinguiſhed from the preſent caſe by another circumſtance, namely, that the freehold and leaſehold property was ſo blended together that it was quite impoſſible to ſuppoſe that the teſtator could have intended to ſeparate them. The caſe of *Lowther* v. *Cavendiſh*, *Amb.* 356. was decided ſimply on the ground of intention apparent on the face of the will that the leaſeholds ſhould paſs. In the preſent caſe it is impoſſible to diſcover any intention of the teſtator expreſſed upon the face of his will to paſs the leaſehold. All the limitations are applicable to freehold property only; and the words "executors and adminiſtrators" never once occur. Beſides, as the lands, *&c.* are limited by the general deviſe to truſtees to uſes, if the leaſeholds were included in this deviſe, the legal property of the freehold would go to one perſon and of the leaſehold to another; for the uſe of the former would be executed in the *ceſtuy que uſe* by the ſtatute, whereas the legal eſtate in the latter would remain in the truſtees.

Runnington Serjt. for the Defendants. The general terms uſed in the clauſe in queſtion are ſufficient to paſs the leaſehold together with the freehold property. Though in *Roſe* v. *Bartlett* the language uſed is undoubtedly very ſtrong in ſupport of the argument urged on the other ſide, yet ſubſequent to that caſe the rule has been varied in many inſtances, and the Courts have inclined to decide, that where they can collect from the will that it was the intent of the teſtator to paſs his leaſehold together with his freehold property under a general clauſe of this kind, the leaſehold is paſſed accordingly. In *Turner* v. *Huſler* Mr. Baron *Eyre* obſerves, that the determination of *Roſe* v. *Bartlett* was very early, and that he was lead to think it aroſe from the old idea of the dignity of the freehold, and the ſmall value of the *intereſſe termini*; but that from the change of circumſtances the rule was become unſatisfactory. *Davis* v. *Gibbs* was decided on the intent of the party deviſing, the clauſe in diſpute being a deviſe of all "manors meſſuages lands tenements hereditaments and *real eſtate*" and there being another clauſe under which the leaſehold evidently paſſed. Though the general rule is recognized in *Knotsford* v. *Gardner*, and *Chapman* v. *Hart*, yet in *Piſtol* v. *Riccardſon* the obſervation of Lord *Mansfield*, that nothing appeared in the will indicating an intention to paſs the leaſeholds, ſeems to ſhew, that if any ſuch intention could have been diſcovered, his Lordſhip would have held the words of the deviſe ſufficiently comprehenſive. Certain it is, that *Addis* v. *Clement* was not referred to in that caſe; and in *Lane* v.

Lord Stanhope Lord *Kenyon* obſerves, that in *Piſtol* v. *Riccardſon* Lord *Manſfield* ſeemed to feel himſelf preſſed by a torrent of authorities, and that if *Addis* v. *Clement* had then been mentioned the Court would have decided the other way with leſs reluctance, and that the ground of determination was, that all the words there uſed had received in other caſes a certain technical conſtruction. That caſe of *Lane* v. *Lord Stanhope*, if correct, has put the queſtion at reſt, inaſmuch as the word "farms" was there held to paſs the leaſeholds, as it appeared from the circumſtances of the caſe, that the teſtator muſt have intended them to paſs. The ſtrict rule therefore laid down in *Roſe* v. *Bartlett* is no longer the governing principle, but the intention of the teſtator muſt prevail, and if the words of the will are ſufficiently general to include leaſehold, the Court will not reſtrain them. Here the words are as general as poſſible, being his "manors *meſſuages* lands tenements and hereditaments", and if in *Turner* v. *Huſler* the word "tithes", and in *Lane* v. *Lord Stanhope* the word "farms", were held to carry leaſehold, why ſhould not the word "meſſuages" in this caſe? Here the teſtator had 70 years to run in the leaſeholds, which amounting to the value of the whole fee, he might look upon them in the light of freehold property. It has been objected that the ſtrict limitations in this will, not being applicable to leaſehold property, ſhew that the teſtator did not intend the leaſeholds to paſs in a clauſe the contents of which are made ſubject to thoſe limitations: but the ſame limitations exiſted in thoſe Equity caſes, where due weight was given to intention. Having given 5000*l.* to his wife in lieu of theſe very leaſeholds, it is clear that he had them in contemplation at the time of making his will, and if he had not ſuppoſed them to paſs under the general clauſe they would have been ſpecifically mentioned in the reſiduary clauſe.

Lord Eldon, Ch. J.—Though the Court is not called upon in this caſe to ſtate the reaſons for the certificate, which it is diſpoſed to return to the Lord Chancellor, yet, as it has not been unuſual upon ſimilar occaſions to mention the grounds upon which the opinion of the Court has proceeded, I ſhall follow the example of Lord *Kenyon* in *Lane* v. *Lord Stanhope*, and ſtate my reaſons for thinking that the leaſeholds do not paſs under the general deviſe of the teſtator's manors, meſſuages, *&c.* I adopt the words of his Lordſhip in that caſe, "It is our duty in conſtruing a will to give "effect to the deviſors intention as far as we can conſiſtently with "the rules of law, not conjecturing but expounding his will from "the words uſed." And I am particularly impreſſed with the latter expreſſion "not conjecturing, but expounding his will from the words uſed." I will firſt conſider this will, as if the conſtruction was unprejudiced by any rule of law, or by any deciſions in which diſtinctions reſpecting ſuch rules may have been taken. When we find limitations in a will, inapplicable to perſonal eſtate, though we are not thereby authoriſed to ſay that the perſonal eſtate ſhall not paſs, provided the teſtator has uſed words clearly ſufficient to paſs it; yet the acknowledged inapplicability of thoſe limitations to perſonal eſtate is a circumſtance from which the intent may be collected if the words of deviſe are ambiguous. In an accurate ſenſe when a man ſays "my lands and hereditaments" he means thoſe which are throughout his own. When therefore we ſee limitations which apply to real eſtate as diſtinguiſhed from perſonal eſtate, or even when we find that by holding the latter to be included in the general deviſe the wiſh imputed to the teſtator to give it to the ſame perſon as the freehold may not, by virtue of ſuch limitations, be gratified for above one moment; we may conſider the nature of the limitations as affording ſtrong evidence that the teſtator really had not the intention that the perſonal eſtate ſhould paſs. I conſider the whole of this will, as part of the caſe referred. I find no circumſtance ſtated which goes beyond the mere fact, that the teſtator was poſſeſſed of two leaſehold houſes, for terms of about 70 years. It does not appear that there was any equitable right of renewal, nor were the premiſes in queſtion blended in enjoyment or otherwiſe, with any freehold land; there is no difficulty in diſtinguiſhing them from each other; they have never been demiſed together at one rent reſerved to heirs; they are ſhort terms. No one of thoſe particular circumſtances which were relied upon in former caſes exiſts in this: it is the ſimple caſe of terms for years, and a caſe of property, *primâ facie*, that ſort of property which a diſpoſition of perſonal eſtate muſt be intended to paſs. In this will, in the firſt place, the teſtator directs that his debts and funeral expences ſhall be paid out of his perſonal eſtate, but if that ſhall not be ſufficient, he charges his real eſtate with the deficiency. Here in the beginning of the will then a diſtinction between real and perſonal eſtate is introduced. In the laſt clauſe of the will he deviſes "all his money ſecurities for money goods chattels effects and all other his perſonal eſtate not therein before diſpoſed of or to be diſpoſed of by any codicil." It has been obſerved, that by the words "perſonal eſtate," in this laſt clauſe, muſt be meant perſonalty *ejuſdem generis* with money, *&c.* But am I conjecturing, or am I expound-

1800.

Thompson v. Lady Lawley and Others.

expounding when I ſay that he meant one thing by the words "perſonal eſtate" at the beginning of the will, and another by the ſame words at the end? Look at this in another point of view; the general rule reſpecting the application of aſſets is very much like that which the teſtator has here appointed. Firſt, the perſonal eſtate is to be applied, and then the real. But the perſonal eſtate ſo to be applied is the perſonal eſtate not ſpecifically diſpoſed of. Now if the leaſeholds in queſtion paſſed with the freeholds, then thoſe leaſeholds are ſpecifically diſpoſed of; and if the perſonal eſtate not ſpecifically diſpoſed of ſhould happen to be inſufficient for the payment of debts, out of what fund and in what manner are we to ſuppoſe that the teſtator has directed them to be paid? He has ſettled his different freehold eſtates on different perſons. If therefore it be neceſſary to reſort to the real eſtates for payment of debts, a valuation of them muſt be taken, and they muſt contribute *pro ratâ*; but perſonalty ſpecifically diſpoſed of muſt alſo contribute; and then in the conſtruction of a will which ſays, the perſonalty is firſt to be applied, we are, if the general perſonal eſtate is inſufficient, to conſider it as agreeable to the teſtator's intention, though he has not bequeathed his leaſehold eſtates *eo nomine*, that they ſhould be preſerved as anxiouſly as the freehold, and ſhould only contribute together with them, according to their value. With reſpect to the word "meſſuages" as uſed in this will, it is to be obſerved, that in the deviſe of the manor of *Wheldrake* it is moſt clearly applied to freehold eſtate only: and therefore there is no reaſon to ſuppoſe, that when he uſed the ſame word in the general clauſe, under which it is contended that the leaſeholds paſs together with the freeholds, he meant to apply it in both thoſe ſpecies of property. The eſtates included in the general deviſe are limited to the iſſue (if he ſhould have any) of the deviſor in tail, with ſeveral remainders over: now if the deviſor had left a ſon living at the time of his death, and that ſon had died inſtantly afterwards, the leaſehold property would have been neceſſarily ſeparated from the freehold, ſince the former would have gone to the adminiſtrator of ſuch ſon, and the latter would have veſted in the remainder-man. Why are we then to be ſo anxious to impute intentions to teſtators, the gratification of which they uſe means and terms ſo little calculated to ſecure? It was obſerved, that the limitation being after failure of iſſue of his body was too remote: but attending to his real intention, and the caſe of *Pelham* v. *Gregory* (a)

(a) 5 *Bro. Parl. Caſ.* 435.

Thompson v. Lady Lawley and Others.

in the Houſe of Lords, we might hold, that if he had iſſue, the leaſehold would veſt in the iſſue, and if he had none in actual exiſtence at his death, the leaſehold, if it veſted in the after-takers, would be ſubject to be diveſted as ſoon as any iſſue of his ſhould come into actual exiſtence. In that part of the will where a power is given to charge the eſtates deviſed with portions for younger children, it is clear he meant the power ſhould extend to all the property which he deviſed under the general words; but he provides that if ſuch portions ſhall be raiſed by demiſe or mortgage the ſame ſhall be redeemable by the perſon entitled to the freehold and inheritance of the demiſed or mortgaged premiſes: he thought therefore that he had an inheritance in the property he deviſes, and which he gives a power of mortgaging. Then follows the only clauſe which could ſuggeſt any doubt to an unlettered mind; in which the deviſor declares that it was his intention to give his wife the choice of one of his manſion-houſes in *Yorkſhire* or *London*, or the houſe that he had lately purchaſed at *Putney*, but that ſhe had declined it, and that he therefore gave her 5000*l*. Now although the wife might have choſen the *Yorkſhire* houſe, which was a freehold; yet it is obſervable that, as his will finally ſtands, the compenſation is taken out of the perſonal eſtate: and it ſeems not unreaſonable therefore that the reſiduary legatees who are to pay that 5000*l*. ſhould take the leaſehold in lieu of it. By the laſt clauſe the teſtator gives "all his perſonal eſtate not herein before diſpoſed of, or to be diſpoſed of by any codicil". Now it ſeems impoſſible to ſay, that the words "herein before diſpoſed of" may not be ſatisfied by the legacies before given; but this teſtator might mean by a codicil to diſpoſe of thoſe leaſeholds, ſuffering them to paſs by the general clauſe if he made no codicil. As to the argument that the perſonal eſtate muſt mean perſonalty *ejuſdem generis*, I cannot truſt my mind with an argument ſo like a conjecture: the words are large enough to paſs perſonalty of any ſort; and I do not underſtand how that mind reaſons, which deems the intention of a teſtator ſatisfactorily made out by that kind of argument. I was ſtruck with the obſervation, that as the property is limited to truſtees to uſes, the ſtatute draws the legal eſtate in the freeholds out of the truſtees, and veſts it in the *ceſtuy que uſe*, whereas the legal eſtate in the leaſeholds remains in the truſtees. As to the ſuppoſed anxiety of the teſtator, that the two ſpecies of property ſhould go together, it is more uſual to demonſtrate that anxiety either by directing that the leaſeholds ſhall be enjoyed

1800.

THOMPSON v. Lady LAWLEY and Others.

together with the freeholds as long as the rules of law and equity will admit, or by introducing very ſpecial words and limitations for that purpoſe, adapted to the nature of the leaſeholds. No teſtator who meant that they ſhould go together, ever made a will under reaſonably good advice in its terms ſo little calculated to produce the intended effect as this teſtator has done: though in truth a ſimilar obſervation may be made upon the inefficacy of the terms uſed to ſecure ſuch a ſuppoſed intention in almoſt every caſe, where upon the ground of intention leaſeholds have been held to paſs under general words. As to the caſes; the firſt mentioned is *Roſe* v. *Bartlett*. It was ſuppoſed in *Turner* v. *Huſtler* that the rule there laid down originally obtained on the ground of the ſmall value formerly attached to leaſehold intereſt as oppoſed to the dignity of the freehold. It may be ſo, though I doubt whether it was ſo: but where I do not know the origin of the rule I cannot reaſon from the ſuppoſed cauſes of the rule, without knowing them, till I allow myſelf, in that ſtate of uncertainty, to deny effect to the rule. Finding meſſuages and lands limited to uſes inapplicable to leaſehold intereſts, I think I may more ſafely ſuppoſe that the teſtator intended to paſs ſuch meſſuages and lands as might be limited to ſuch uſes. Lord *Hardwicke* ſeems to have conſidered the rule acknowledged in *Roſe* v. *Bartlett* to have been a rule proceeding on intention, and to have thought that where a teſtator gives *his* lands and tenements he muſt, *primâ facie*, be taken to mean thoſe lands and tenements which are ſtrictly his, *viz.* thoſe in which he has an inheritance. Whether the rule laid down in *Roſe* v. *Bartlett* were wiſely adopted or not, it is unneceſſary for us to determine; but that caſe having once eſtabliſhed a general rule, I had rather conſent pointedly and avowedly to contradict that rule in terms than to acknowledge it in words and deny it in effect, by raiſing diſtinctions which in fact make it impoſſible for any man to decide in any particular caſe what is the legal conſtruction of a will as to this point, till he has obtained the authority of a court of law, in a judgment upon the will, for the opinion which he gives. I obſerve that the rule has not been denied in any of the caſes which have followed *Roſe* v. *Bartlett*. Lord *Hardwicke* in *Knotsford* v. *Gardiner* ſpeaks of it with the greateſt reſpect; and indeed Mr. *Atkyns* ſeems to make him ſpeak of it in ſtronger terms than the rule itſelf will warrant, ſince he reports his Lordſhip to have ſaid, that although he had no doubt of the intention of the teſtator, yet the rule of law muſt prevail. In *Chapman* v. *Hart*, Lord *Hardwicke* again recognized the rule, and even carried his reſpect for it ſo far, that although the will was executed in ſuch a manner as to carry perſonal property only, yet as the words of the deviſe were properly applicable to freehold only, his Lordſhip would not ſuppoſe that the teſtator by thoſe words intended to paſs that ſpecies of property which could paſs by a will ſo executed. Both in *Addis* v. *Clement*, and *Davis* v. *Gibbs*, the rule was expreſsly acknowledged. It is not my buſineſs to conſider whether the diſtinction raiſed on the former of thoſe caſes was fairly ſufficient, conſiſtently with the ſafety of property and titles, to exempt it from the application of the general rule: but when the rule is once admitted I muſt decide upon my own conviction reſpecting its applicability to the particular caſe which comes before me. No doubt, thoſe who decided the caſes in which the general rule has been held not to apply, were ſatisfied that the circumſtances before them were ſufficient to warrant the exception, and that the exception could be taken with ſafety to the rules of property: but it is enough for me to ſay, that none of the circumſtances relied on in thoſe caſes are to be found in this. I cannot help adding, that if the principle be juſt, that we are not to conjecture, but to expound, it does appear to me that we do not ſtrictly abide by the rule, that we indulge in what is rather conjecture than expoſition, if we are to proceed on ſuppoſitions of what the teſtator may be imagained to have underſtood as to the nature of his own property, of what he forgot and of what he remembered concerning it; ſuppoſitions not founded in his acts or expreſſions. It is not very eaſy, in my judgment, to find a ſound diſtinction, ſound as obviouſly conſiſtent with the ſafety of titles, between the caſe of *Addis* v. *Clement* and *Davis* v. *Gibbs*, if the diſtinction is to reſt only upon ſuch words as "poſſeſſed of or intereſted in," and yet the former of thoſe caſes does afford a diſtinction between that and *Piſtol* v. *Riccardſon*, aimed at by Mr. J. *Lawrence* in *Lane* v. Lord *Stanhope*, namely, that the words "poſſeſſed of" occurred in that caſe, and not in *Piſtol* v. *Riccardſon*; and authority has certaiuly laid ſtreſs upon the diſtinction. Yet it cannot be denied that theſe words are very frequently, if improperly, uſed as to freehold as well as leaſehold: and if thoſe words follow expreſſions which, according to the rule, are *primâ facie* to be taken to ſignify

1800.

THOMPSON v. Lady LAWLEY and Others.

freehold, as “ lands, tenements, and hereditaments,” are we ſure that we are expounding and not conjecturing when we ſay that the teſtator intended to apply them both to freehold and leaſehold, though his limitations are ill adapted to leaſehold property; and very ill adapted to it if meant to ſecure, as far as may be, the enjoyment of it together with freehold. And yet the caſe of *Addis* v. *Clement* muſt be underſtood to proceed upon the word “ poſſeſſed;” at leaſt the moſt material reaſoning in the judgment proceeds upon it. But the diſtinction between that caſe and *Davis* v. *Gibbs*, and between that caſe and *Piſtol* v. *Riccardſon*, does not reſt merely upon ſuch words. The nature of the teſtator's intereſt in leaſeholds and in renewable leaſeholds is very different, and ſomething is due to the conſideration, whether the property is or is not blended in enjoyment. It was argued in *Davis* v. *Gibbs*, that as the teſtatrix had no freehold intereſts except in *Kent*, and the general deviſe related to *Kent*, *Eſſex*, and *Bucks*, the chattel intereſts in the two latter countries muſt paſs in order to ſatisfy the will: on the other hand it was ſaid, that this clauſe might be ſatisfied by the fee-ſimple in *Kent*, and that if the chattel intereſts paſſed under it, there would be nothing to ſatisfy the word “ mortgages” in the laſt clauſe relative to the perſonal eſtate; and the judgment ſeems to have turned upon this. It muſt however be obſerved, that though when a will ſpeaks of lands, it means lands which the teſtator has at the time of making the will, and it will paſs thoſe and thoſe only; yet when it ſpeaks of perſonalty, it will paſs ſuch as the teſtator ſhall have at the time of his death, though he had it not at the time he made his will. It ſeems ſingular to inſiſt that the words “ mortgages and credits” in that reſiduary clauſe as to the perſonal eſtate, neceſſarily meant the mortgage for years, and the extended intereſt which the teſtator had at the time of making his will; when it muſt be admitted that if before his death he had parted with them and acquired others, the words would have paſſed ſuch others though he had acquired them after he made his will. And it is difficult to admit the conſiſtency of that reaſoning, which ſays that the terms “ lands in *Kent*, *Eſſex*, and *Bucks*,” are all ſatisfied by lands in *Kent* only, though he had a mortgage in *Eſſex* and an extended intereſt in lands in *Bucks*, and yet at the ſame time inſiſts that mortgage and extended intereſt are neceſſary to ſatisfy the words “ mortgages and credits” in the reſiduary clauſe, which would have their operation if the teſtator had before his death any other, and had not at his death that very mortgage or that very extended intereſt. The argument ſeems to treat a general reſiduary clauſe containing an enumeration of particulars, as if it operated only as a ſpecific bequeſt of ſuch particulars of perſonalty as the teſtator had at the time of making the will, anſwering in deſcription to the particulars enumerated; though it would operate upon thoſe alſo which he ſhould afterwards acquire and have at his death. In fact it muſt often happen that where all perſonal eſtate is given, and an enumeration of particulars, unneceſſary becauſe all perſonal eſtate is given, is added, the teſtator enumerates ſome particulars which he has, and many which he has not, and arguments, drawn from intention founded upon the terms occurring in ſuch enumerations are not perhaps of all arguments the moſt ſatisfactory, if in truth they are not the leaſt ſo. In the caſes of *Knotsford* v. *Gardner*, and *Chapman* v. *Hart*, Lord *Hardwicke* came to very ſtrong deciſions in favour of the rule in *Roſe* v. *Bartlett*, and conſidered it at leaſt as a rule not to be departed from without demonſtration plain of the intent of the teſtator: and when we recollect how thoroughly Lord *Hardwicke* was verſed both in law and equity, it is not to be ſuppoſed that he was ignorant either of *Addis* v. *Clement* or *Davis* v. *Gibbs*. Next came the caſe of *Lowther* v. *Cavendiſh*, which appears to me to be very looſely reported by *Ambler*; and I am not diſpoſed to believe that Lord *Northington* ever made uſe of the expreſſions reſpecting *Roſe* v. *Bartlett*, which are there attributed to him. We all know that he was poſſeſſed of great law learning and a very manly mind; and I cannot but think that he would rather have denied the rule altogether, than have ſet it afloat by treating it with a degree of ſcorn, and by introducing diſtinctions calculated to diſturb the judgments of his predeceſſors and remove the landmarks of the law. But be that as it may, the point on which Lord *Northington* put the caſe was, that it was the obvious intention of the teſtator that one of his name ſhould take all his eſtates in one county and another in another county; that his general primary intention was to make one great *Cumberland* man, and one great *Yorkſhire* man, and that the property in each county, with exceptions, ought to go accordingly. That caſe therefore is to be conſidered as a caſe of exception from the general rule. In *Turner* v. *Huſler*, Mr. Baron *Eyre*, then ſitting for Lord *Thurlow*, was of opinion, that by the word "tithes," attending to the nature of the teſtator's intereſt in them, and conjecturing what he might think about them, both the freehold and leaſehold tithes of the teſtator might paſs. In coming to that deciſion, however, he lays hold of particular circumſtances in the caſe, ſuch as the perpetual intereſt in the renewal, but he does not at all deny the general rule in *Roſe* v. *Bartlett*, or ſay that it is to be no longer conſidered as an authority in the law. Whether that deciſion be altogether ſatisfactory I will not preſume to ſay; but thus much I may obſerve, that I ſhould have had conſiderable difficulties in the caſe; and ſitting as a judge in a court of equity, I ſhould have felt myſelf much relieved in being able, in conformity to its practice, and out of reſpect to the deciſion of judges and courts in former times, to have aſked the opinion of a modern court of law on the ſubject. This was followed by the caſe of *Piſtol* v. *Riccardſon*, which appears to me to be a caſe of great authority. Lord *Mansfield* was very unwilling to come to the deciſion which he ultimately made; the caſe was twice argued before him. It has been ſuppoſed indeed that his Lordſhip was not aware of the caſe of *Addis* v. *Clement*. Whether his Lordſhip would have come to a different determination had the caſe of *Addis* v. *Clement* been cited, or whether any diſtinction ſo ſatisfactory as to be confidently acted upon is to be found between the two caſes, I do not feel myſelf bound to examine; but it does not appear to me that any very uſeful purpoſe would have been ſerved by a contrary deciſion, conſidering how ſhort a time even in that caſe the freehold and leaſehold eſtates would probably have gone together. In all the caſes, or almoſt all of them, the teſtator has had an intention imputed to him that his freehold and leaſehold eſtates ſhould be kept together, and this has been imputed in caſes where the will appears to have been ſkilfully and artificially drawn. Is it poſſible if a teſtator had diſcloſed ſuch an intention to his man of buſineſs, that he would have ſo inadequately expreſſed that intention as to uſe the terms occurring in this caſe, and in many of the other decided caſes? I can hardly ſay that in any one of them there is an attempt by words or limitations to make the leaſehold go together with the freehold as far as the rules of law and equity will admit, that is, to render the leaſehold inalienable till about the ſame time at which a recovery can be ſuffered of the freehold. Why are we to be anxious to impute an intention which, the teſtator, if he entertained, has expreſſed in terms ſo little calculated to give it effect, that the doctrines of law, operating upon the words which he has actually uſed, will not permit any court to effectuate it but in a degree al-

1800.

THOMPSON
v.
Lady
LAWLEY
and Others.

together ſhort of the extent in which it is imputed to him? The mode of limiting them ſo that they may go together is familiar to every man of buſineſs; that mode is not purſued in any of the caſes I have met with; yet in all thoſe caſes the wills are ably and artificially drawn: the inference may be thought to be that the intention had not occurred either to the teſtators or their men of buſineſs. The caſe of *Lane* v. Lord *Stanhope*, however, furniſhes a principle upon which I am diſpoſed to decide the preſent, becauſe it profeſſes to proceed upon the intent. In that caſe the freehold and leaſehold parts were ſo blended that they were incapable of being diſtinguiſhed, and they had been enjoyed together from time immemorial. They had been demiſed as one term under a rent reſerved to the leſſor and his heirs. This reſervation is a fact from which we may infer that the teſtator thought the whole his inheritance: it is not a caſe in which we are conjecturing about his thoughts without acts upon his part to ſerve as the grounds of conjecture. The premiſes were alſo held with a right of renewal. The firſt taker of the real eſtate was alſo the reſiduary legatee of the leaſehold eſtate: if therefore the teſtator did not intend that the freehold and leaſehold ſhould go together, he muſt have had this ſpecial intent, namely, that the firſt taker ſhould have an eſtate for life in the freehold part, and under the reſiduary clauſe an abſolute intereſt in the leaſehold part; from which circumſtance this conſequence might have ariſen, that when the firſt taker died there would have been a ſeparation of the different parts of a farm ſtated to be incapable of being diſtinguiſhed. That difficulty muſt have been got over; and if it could not be done in any other way, ſo many acres muſt have been ſet apart (according to the rule of equity) for the freehold intereſt, and ſo many for the leaſehold. The difficulty however was thought to afford a ſtrong ground for inferring the intention of the teſtator that the whole ſhould paſs together, in a caſe where he had deviſed the farm as a farm. In truth the deviſe of a farm as one entire thing, where the teſtator had a farm compoſed of theſe different parts, is perhaps as ſound a ground for the judgment as any in the caſe. With reſpect to the ſuppoſed intent of the teſtator that the freehold and leaſehold ſhould go together, how imperfectly was that ſecured in this very caſe? If the firſt taker for life of the freehold, and who was intitled to the leaſehold either for life by virtue of the limitations, or abſolutely as reſiduary legatee, had a ſon who had come into exiſtence and continued in it but for a moment, the intended union of enjoyment

1800.

Thompson v. Lady Lawley and Others.

would have been inſtantly ſevered between his adminiſtrator and the remainder man. If the teſtator had any intention upon the ſubject, the careleſſneſs of the perſon who framed his will, had left it expoſed to immediate diſappointment, and yet the general tenor of the will beſpeaks legal ſkill in the perſon who penned it, and ſkill abundantly competent to ſecure the execution of the teſtator's purpoſe, if he really meant to keep the freehold and leaſehold together as long as the law would allow. It is utterly impoſſible to aſſert that ſuch an intention is in any reaſonable degree effected by the terms of that will. The caſe of *Roſe* v. *Bartlett*, however, was thought not to apply, becauſe it was conceived that it manifeſtly appeared not to be the intention of the teſtator to paſs the freeholds only: but it was admitted that if the caſe had been ſimilar in terms to *Roſe* v. *Bartlett*, the ſame intention would have been inferred upon the rule of law. The caſe of *Lane* v. Lord *Stanhope* was decided on its own circumſtances; but this caſe not only has none of thoſe circumſtances, but is as different in circumſtances of fact from *Lane* v. Lord *Stanhope* as any which ingenuity could ſtate. The rule in *Roſe* v. *Bartlett* is a rule which has been acknowledged for ages, and upon which I ſhall act until I am informed by the higheſt authority that I am no longer to regard it. Till I ſhall be ſo informed I ſhall ſubſtantially regard it in judgment, for I think it better to overrule it all together, which I muſt not do, than to deny to it its effect upon grounds which do not completely ſatisfy my mind as ſolid and ſafe grounds of diſtinction.

Heath J. The caſe has been ſo fully diſcuſſed by my Lord, that I ſhall ſtate my reaſons very ſhortly. I have always underſtood the rule of law laid down in *Roſe* v. *Bartlett* to be a rule of property not to be ſhaken; and I have often heard it cited and recogniſed. It is a rule founded on intention; and therefore in the caſes cited the judges have proceeded on intention, and where they could collect that the intention of the teſtator was that both freehold and leaſehold ſhould paſs, they have ſo determined. Thus the caſes of *Addis* v. *Clement*, *Turner* v. *Huſler*, and *Lane* v. Lord *Stanhope*, whether well or ill decided, have all proceeded on ſpecial circumſtances from whence the intention was collected. It is ſufficient to ſay that no ſuch circumſtances occur in this caſe. Beſides, the teſtator has uſed the words "meſſuages" and "hereditaments" in the ſame ſenſe; and it is therefore to be inferred, that by the word "meſſuages" he could mean thoſe meſſuages only which were hereditaments.

reditaments. In ſome places he ſays "meſſuages lands tenements and hereditaments," but in others he ſays "meſſuages and *other* hereditaments."

ROOKE J. My opinion is founded on the caſe of *Roſe* v. *Bartlett*; which I conſider as a rule of property not to be ſhaken. The caſes cited in oppoſition to the rule have all admitted it, but have proceeded on ſpecial circumſtances. With reſpect to the rule itſelf Lord *Hardwicke* expreſsly ſaid that it was not to be departed from, and Lord *Mansfield* held the ſame doctrine. I cannot agree that the rule has been ſo far ſhaken that the *onus* is to be thrown on the perſonal repreſentative of ſhewing that the leaſeholds are not intended to paſs: on the contrary I think that the leaſeholds muſt be taken not to paſs unleſs ſpecial circumſtances can be ſhewn clearly demonſtrative of a contrary intent; and no ſuch circumſtances are to be found in this caſe.

CHAMBRE J. Whether we argue this caſe upon the rule in *Roſe* v. *Bartlett*, or upon the intention of the teſtator, we muſt come to the ſame concluſion. The rule laid down in *Roſe* v. *Bartlett* is now ſo fully eſtabliſhed that all the courts of juſtice are bound to conform to it: it has been conſidered as in force from the time of Charles the Firſt to the preſent period, and has been recognized by the higheſt authority. With reſpect to the intent of the teſtator, this caſe abounds with pregnant circumſtances to ſhew that he did not mean to include the leaſeholds in the general deviſe.

The following certificate was ſent to the Lord Chancellor:

We have heard this caſe argued by counſel, and attending to the whole of the will of the teſtator *Beilby Thompſon*, We are of opinion that the leaſehold houſes and premiſes in *Middleſex* and *Surrey* did not paſs by the general deviſe ſtated in this queſtion.

ELDON.
J. HEATH.
G. ROOKE.
A. CHAMBRE.

Nov. 24th.

WILSON *v.* HARRIS.

Taking out a ſummons for further time to plead, is no waver of the Defendant's right to move to change the venue.

THE Defendant in this caſe took out a ſummons for a month's time to plead on the 14th of *November*, and ſerved it on the Plaintiff's attorney; on the next day it was returned indorſed with the Plaintiff's conſent for a week's further time, on the terms of the Defendant pleading iſſuably, rejoining *gratis*, and taking ſhort notice of trial for the adjournment day at the ſittings in *London* after this term. The Defendant not liking the terms offered pleaded within the time he originally had to plead in, and did not accept the conſent for further time or go before a judge upon the ſummons. On the 15th he obtained a rule *niſi* for changing the venue; and *Lens* Serjt. in ſupport of that rule now referred to *Tidd's Pr.* 364. *ed.* 1. 528. *ed.* 2. to ſhew that merely taking out a ſummons for further time to plead is no waver of the Defendant's right to apply to change the venue, inaſmuch as an order for time to plead is no waver of that right, except in caſes where the order being obtained on the terms of pleading iſſuably and taking ſhort notice of trial for *London* or *Middleſex* by changing the venue a trial would be loſt (*a*).

Shepherd Serjt. *contrà* inſiſted that the party who moves to change the venue ought to apply before he does any thing to ſhew that he means to proceed in the county where it is laid, and that the Defendant by taking out a ſummons had accepted the venue as laid.

CHAMBRE J. obſerved that this kind of caſe had often occurred within his recollection in practice, and that parties were never held to wave their right to change the venue unleſs where they expreſsly accepted the terms offered. He added, that the point had lately been ſo decided in the Court of Exchequer.

The reſt of the Court were of the ſame opinion.

Rule abſolute.

(*a*) In ſupport of this poſition ſee *Shipley* v. *Cooper*. 7 *T. R.* 698. and the caſes there cited in the note.

1800.

BLAKEY *v.* DIXON and Others.

Nov. 24th.

Declaration "that in conſideration that the Plaintiff had taken Defendants' goods on board his ſhip to be carried to *A.*, the Defendants promiſed "to pay the money due for freight and carriage of the ſame on the delivery of the bill of lading;" that the bill of lading was delivered, by reaſon whereof the Defendant became liable to pay a large ſum, to wit, 20*l.* for freight and carriage of the ſaid goods". Held bad on demurrer, becauſe it did not appear that any thing became due for freight on the delivery of the bill of lading.
Qu. Whether in alleging the promiſe to pay, the Plaintiffs ſhould not have ſtated a ſpecific ſum, or ſaid ſo much as ſhould be reaſonably due?

ASSUMPSIT. The firſt count of the declaration ſtated "that on &c. at &c. in conſideration that the Plaintiff at the ſpecial inſtance and requeſt of the Defendants had received and taken on board a certain ſhip or veſſel of him the Plaintiff divers goods wares and merchandiſe to wit a two-wheeled carriage and harneſs to be carried on board the ſaid ſhip or veſſel from the port of *London* to parts beyond the ſeas to wit to *Surinam* they the Defendants undertook and then and there faithfully promiſed the Plaintiff to pay him the money due to him for freight and carriage of the ſame on the delivery of the bill of lading thereof to them; that the bill of lading thereof was afterwards to wit on the ſame day and year aforeſaid delivered to them to wit at &c. and by reaſon thereof the Defendants then and there became liable to pay to the Plaintiff a large ſum of money to wit the ſum of 20*l.* for the ſaid freight and carriage of the ſaid goods wares and merchandiſe whereof they the Defendants had notice." There were other counts in *indebitatus aſſumpſit*.

The Defendants demurred ſpecially to the firſt count, and aſſigned for cauſes "that the Plaintiff had not in and by his ſaid firſt count averred nor doth it thereby appear that any ſum of money was at any time due to the plaintiff for freight or carriage of the ſaid goods wares or merchandiſe in that count mentioned, and that it does not appear in or by the ſaid firſt count of the ſaid declaration that the ſaid Plaintiff ever carried the ſaid goods wares and merchandiſe from the port of *London* aforeſaid, and that the ſaid firſt count of the declaration aforeſaid is in various other reſpects inſufficient uncertain inconcluſive and informal." There was alſo a general demurrer to the other counts.

Bayley Serjt. in ſupport of the demurrer. The promiſe on the face of this firſt count is to pay on the delivery of the bill of lading the money due for freight and carriage; unleſs therefore ſomething was due for freight and carriage at the time of the delivery of the bill of lading the Defendants have made no promiſe to pay any thing. Now according to the general rule of law nothing is due for freight until the ſhip has arrived, and it does not appear from this firſt count that the ſhip had ever quitted the port of lading. If there was any ſtipulation taking this caſe out of the

1800.

Blakey v. Dixon and Others.

general rule it ſhould have been ſpecially ſtated. It is impoſſible for the Plaintiff to contend that the concluding words "and by reaſon thereof the Defendants became liable to pay a large ſum of money to wit 20*l.* for the ſaid freight and carriage" &c. can amount to an averment of any ſuch ſtipulation, for theſe words only ſtate a concluſion of law, and unleſs that concluſion be warranted by the premiſes it muſt fall to the ground. Thus in *Ruſhton* v. *Aſpinall*, *Doug.* 679. where no demand on the acceptor was alleged in an action againſt the indorſer of a bill of exchange, Lord *Mansfield* ſaid, "the promiſe alleged to have been made by the Defendant is an inference of law and the declaration does not contain premiſes from which ſuch an inference can be drawn." With reſpect to the demurrer to the other counts it cannot be ſupported.

Shepherd Serjt. *contrà.* I admit that the concluding averment will not cure the defect in the declaration if there be any. But although freight is not in general payable until the arrival of the goods, yet by ſpecial contract it may be made payable at any other period. In point of fact it is always cuſtomary in the carriage of goods to *India* to contract for payment of the freight previous to the ſailing of the ſhip. Here the Defendants have promiſed to pay the money due for freight at the time of the delivery of the bill of lading, and it is matter of evidence whether any thing were due for freight at that time or not. If the Plaintiff prove at the trial that the Defendants contracted to pay the freight on the delivery of the bill of lading, that will ſufficiently eſtabliſh that the freight was then due.

Lord Eldon Ch. J. It is very clear what the parties meant to ſtate on this record. The Plaintiff was to convey a carriage of the Defendants to *Surinam*; at which place, according to the general rule of law, the freight would become due. But as it might happen that the Plaintiff might find no one at *Surinam* to pay the freight, he contracts to have it paid *ab ante.* What difficulty there could have been in ſtating this contract upon the record I cannot conceive; but the ſtrong inclination of my opinion is, that it is not ſtated upon the firſt count of this declaration. If the Plaintiff meant to ſay that the Defendants undertook to pay for freight and carriage of the goods on the delivery of the bill of lading, though no money ſhould be then due for freight, he ought not to have laid the promiſe to pay the money due for freight; if on the other hand he meant to ſay that the Defendants undertook to pay ſuch

ſum

1800.
Blakey
v.
Dixon
and Others.

ſum of money as ſhould be due for freight and carriage on the delivery of the bill of lading, another objection occurs, namely, that he has not averred that any thing was due for freight and carriage on the delivery of the bill of lading. Nothing could be due on the delivery of the bill of lading but by ſpecial contract, for *primâ facie* the freight is not due until the arrival of the goods (*a*). Though it be true that the Plaintiff is not bound to ſtate all his evidence on the face of his declaration, yet he cannot be permitted to explain one contract by another: having declared on a promiſe to pay the money due for freight on the delivery of the bill of lading, he cannot give in evidence another promiſe to pay the freight when the bill of lading ſhould be delivered.

Heath and Rooke Js. expreſſed themſelves of the ſame opinion.

Chambre J. There could have been no difficulty in adapting the declaration to the Plaintiff's caſe. By the general rule of law both freight and mariners' wages are loſt unleſs the goods are carried to the port of delivery. But where a party demands freight under any other circumſtances he muſt declare ſpecially. He muſt ſo ſtate his facts that the Court may ſee on the record that he is clearly entitled. The receiving goods on board to be carried to a foreign port is a good conſideration to found a promiſe to pay the freight immediately. But in this caſe the Plaintiff ſtates a promiſe by the Defendant to pay the money due for freight on the delivery of the bill of lading. Two circumſtances therefore muſt concur. Firſt, there muſt be ſomething due for freight; ſecondly, there muſt be a delivery of the bill of lading: but with reſpect to the former of theſe the Plaintiff has not ſtated any ſpecial manner in which any thing has become due for freight. I am therefore clearly of opinion that the firſt count of this declaration is bad. Perhaps the count is informal in other reſpects; though it is not neceſſary to purſue the objections. In ſtating a promiſe to pay the money due for freight, the Plaintiff has not ſpecified any particular ſum, or averred that the Defendants promiſed to pay what was reaſonably due; but has merely inſerted the ſum in his ſtatement of the general inference of law at the concluſion of his declaration.

Judgment for the Defendants on the firſt count, and for the Plaintiff on the other counts (*b*).

(*a*) Even an inchoate right to freight does not attach, until the ſhip has broken ground. *Curling* v. *Long*, *ante*, *vol.* 1. *p.* 634.

(*b*) In *Chaſe and Another* v. *Lovering*, *Sty.* 220. the Plaintiffs declared "upon a promiſe made by Defendant to the Plaintiffs, to pay unto them 84 *l.* out of the freight of a ſhip." On *non aſſumpſit* and verdict for the Plaintiffs, the Defendant moved in arreſt of judgment, for that it did not appear that any freight was due out of which the money was to be paid: and the objection was held good.

Nov. 24th.

Doe ex dem. Barnfield and Others *v.* Wetton.

Deviſe " to *S. S.* her heirs and aſſigns for ever; but if ſhe ſhall happen to die leaving no child or children lawful iſſue of her body living at the time of her death then to *F. B.* and his heirs." Held that the deviſe in fee to *S. S.* was not reſtrained by the ſubſequent words to an eſtate tail: and that the deviſe over to *F. B.* was a good executory deviſe.

At the trial of this action before Lord *Eldon* Ch. J. at the Sittings after laſt *Trinity* term, a verdict was found for the Plaintiff, ſubject to the opinion of the Court, upon a caſe which ſtated in ſubſtance as follows:

G. Taylor being ſeiſed in fee of the premiſes in queſtion, which were copyhold, and having previouſly ſurrendered the ſame to the uſes of his will, on the 18th of *May* 1761 deviſed as follows: " I give deviſe and bequeath unto my wife *Phebe Taylor* all my freehold copyhold and leaſehold meſſuages tenements hereditaments and premiſes with their appurtenances whereſoever ſituate for and during her natural life"; after ſeveral bequeſts of perſonal property, and charging the ſaid premiſes with an annuity ſecured by bond he proceeded as follows: " And from and after the deceaſe of my ſaid wife I give deviſe and bequeath all my ſaid freehold premiſes together with my ſaid leaſehold premiſes (charged and chargeable nevertheleſs as aforeſaid) unto my friend *Francis Barnfield* his heirs executors and adminiſtrators, upon truſt nevertheleſs from and after payment and ſatisfaction of the ſaid bond debt to permit and ſuffer my ſaid ſon *John Taylor* to have receive and take the rents iſſues and profits thereof to and for his own uſe and benefit for and during his natural life, and from and immediately after his deceaſe then upon truſt to and for all and every the ſons and daughters of the body of my ſaid ſon *John Taylor* lawfully iſſuing and their heirs and from and after the deceaſe of my ſaid wife as aforeſaid I give deviſe and bequeath all my ſaid copyhold meſſuages and premiſes (charged and chargeable nevertheleſs as aforeſaid) *unto my Daughter* Suſannah Saunders *her heirs and aſſigns for ever but if my ſaid daughter ſhall happen to die leaving no child or children lawful iſſue of her body living at the time of her death then I give deviſe and bequeath* all the ſaid copyhold premiſes chargeable as aforeſaid unto the ſaid *Francis Barnfield* and his heirs upon truſt nevertheleſs by and out of the rents and profits thereof to keep the ſaid premiſes in good and ſubſtantial repair as occaſion ſhall be or require and to pay or permit and ſuffer my ſaid ſon *John Taylor* to have receive and take the reſt and reſidue of the rents iſſues and profits of the ſaid copyhold premiſes to and for his own uſe and benefit for and during his natural life, and from and after his deceaſe then upon truſt to and for all and every the ſons and daughters of the body of my ſaid ſon lawfully iſſuing and their heirs and for want of ſuch iſſue then upon truſt for my right heirs for ever." The teſtator *George Taylor* afterwards died ſeiſed of the premiſes, without altering his will, and upon the 21ſt *May* 1770 his daughter *Suſannah Saunders* was admitted to the premiſes to hold to her and the iſſue of her body lawfully begotten in reverſion expectant upon the death of the ſaid *Phebe Taylor*, and at the ſame court at which the ſaid *Suſannah Saunders* was ſo admitted in reverſion, the ſaid *Phebe Taylor* and *Suſannah Saunders* together with her huſband *Conſtable Saunders* duly ſuffered a recovery according to the cuſtom of the ſaid manor, to the uſe of the ſaid *Phebe Taylor* for life, with remainder in fee to the ſaid *Suſannah Saunders*; who were ſeverally admitted accordingly. The ſaid *Phebe Taylor* died in *March* 1786 in the lifetime of *Suſannah Saunders* who ſurvived her huſband the ſaid *Conſtable Saunders* and afterwards intermarried with the Defendant *Humphrey Wetton*. The ſaid *Suſannah Wetton* (formerly *Saunders*) died about 11th *December* 1799. leaving no lawful iſſue of her body then living, having firſt ſurrendered the premiſes to the uſes of her will, and having alſo afterwards made her will or teſtamentary writing of appointment and thereby given the premiſes to her huſband the Defendant and *Henry Taylor* in truſt as mentioned in her will; and the Defendant and the ſaid *Henry Taylor* were afterwards admitted to the ſame accordingly. *Francis Barnfield* the deviſee in truſt in the will of the ſaid *George Taylor* died on the 18th *April* 1763, leaving the leſſors of the Plaintiff his only ſons and heirs at law according to the cuſtom of the manor him ſurviving, who were thereupon admitted to the premiſes in queſtion in fee at the will of the lord. The queſtion for the opinion of the Court was, Whether the Plaintiff under the circumſtances ſtated was entitled to recover?

Beſt Serjt. for the Plaintiffs. The queſtion is, Whether the deviſe over to *Francis Barnfield* be a good executory deviſe? and this will depend upon another queſtion, Whether the previous deviſe to *Suſannah* be an eſtate in fee? for if that be an eſtate in fee, the deviſe over is an executory deviſe or nothing. The limitation "to *Suſannah Saunders*, her heirs and aſſigns for ever," *primâ facie* imports a fee, and if it had been intended by the teſtator that the words immediately following ſhould reſtrain that eſtate to an eſtate tail, he would not have confined the failure of iſſue to the time of her death. In *Pells* v. *Brown*, *Cro. Jac.* 590. the

1800.

Doe dem. Barnfield and Others *v.* Wetton.

the deviſe was to *Thomas* and his heirs *in perpetuum*, and if *Thomas* died without iſſue living *William* his brother, that then *William* ſhould have the lands to him his heirs and aſſigns for ever; and it was reſolved that *Thomas* took an eſtate in fee and not in tail; for the limitation reſpecting iſſue was not abſolute and indefinite wheneſoever he died without iſſue, but with a contingency, if he died without iſſue living *William*. So in 1 *Roll. Abr.* 835. *pl.* 4. where there was a deviſe of lands to *B.* in fee, and of other lands to *C.* in fee, ſubject to a proviſo that if either died before they were married or before twenty-one and without iſſue, then the eſtate of him ſo dying ſhould go to the ſurvivor, it was held that each took an eſtate in fee, with an executory deviſe over to the ſurvivor for life. To the ſame effect is *Gulliver* v. *Wicket*, 1 *Wilſon*, 105; and the caſes of *Porter* v. *Bradley*, 3 *T. Rep.* 143. and *Roe d. Shears* v. *Jeffery*, 7 *T. Rep.* 589. are in point. Beſides, the word "aſſigns" would never have been inſerted in the former part of this deviſe, if the teſtator had intended that the word "heirs" ſhould denote ſpecial heirs; an eſtate-tail not being in its nature aſſignable.

Clayton Serjt. *contrà*. Though the firſt words of this limitation import a fee, they are ſo controuled by thoſe which follow that *S. Saunders* could only take an eſtate tail. It appears to have been the general intent of the teſtator to provide for his two children and their iſſue. Having limited an eſtate to the ſon and his children, he proceeds to give the eſtate in queſtion to his daughter and her children. Now if the deviſe be conſtrued ſtrictly, the conſequence muſt be, that if all the children of *S. Saunders* ſhould die before her, the eſtate would go over, though ſuch children may have left children living at the death of *S. Saunders*. In order therefore to effectuate the intent of the teſtator, the Court muſt hold that the eſtate would deſcend to ſuch grandchildren; and this cannot be done without giving *S. Saunders* an eſtate-tail. This circumſtance diſtinguiſhes the caſe from *Porter* v. *Bradley* and *Doe* v. *Jeffery*, in which the intent of the teſtator ſeems to have been in favour of a fee. In *Clatch*'s caſe, *Dyer*, 330. *b.* 1 *Rol. Abr.* 839. *pl.* 3. S. C. "one deviſed a meſſuage to *Alice* his daughter and her heirs, and another meſſuage to *Thomaſin* his daughter, then eight years old, and her heirs, and if ſhe died before ſhe attained the age of ſixteen years living *Alice*, then he willed that *Alice* ſhould have *Thomaſin*'s ſhare to her and her heirs; and if *Alice* died having no iſſue living

Thomaſin, that *Thomaſin* ſhould have and enjoy *Alice*'s ſhare to her and her heirs; and if both daughters ſhould die having no iſſue, deviſe over to *J. S.* and his heirs: and it was held (*a*) that the daughter took an eſtate-tail, and not a fee on a contingent ſubſequent." This caſe comes very near the preſent, and though *Pemberton* Ch. J. in *Holmes* v. *Meynell*, Sir *T. Jones*, 173. obſerves that "he had heard great opinions that it was not law," yet it has never been expreſsly denied. A very ſtrong authority for the conſtruction for which I am contending is *Morgan* v. *Griffith*, *Cowp.* 234. where the teſtator having deviſed to *T. G.* for and during his natural life and after his deceaſe to his right and lawful heirs and aſſigns for ever, and for want of ſuch lawful heirs to *T. E.* his heirs and aſſigns for ever, *T. G.* was held to take only an eſtate-tail. It has been a general rule ever ſince the caſe of *Luddington* v. *Kime*, 1 *Salk.* 224. 1 *Ld. Ray.* 203. S. C. that the Court will not conſtrue a limitation to be an executory deviſe, if they can conſtrue it to be a contingent remainder.

Lord ELDON Ch. J. This caſe has on the part of the Defendant been put upon the only ground on which it was capable of being put, *viz.* that it was the manifeſt intention of the teſtator, that the property in queſtion ſhould go to the iſſue of *S. Saunders*. Some principles may be taken as quite clear. If this be a good executory deviſe a recovery will not bar it, and it is equally true that the courts always endeavour to conſtrue a limitation a contingent remainder rather than an executory deviſe. The policy of the latter rule is founded on the very circumſtance that an executory deviſe cannot be barred. After giving the eſtate to *S. Saunders* her heirs and aſſigns for ever, the teſtator proceeds to limit it over to *J. Taylor* in the following terms: "But if my ſaid daughter ſhall happen to die leaving no child or children lawful iſſue of her body living at the time of her death then &c." Now *J. Taylor* to whom the eſtate is here given certainly was a relation of *S. Saunders*, and if the deviſe had been "if my daughter ſhall die without heirs", as *J. Taylor* was the next heir to *S. Saunders* after her own children, it would have ſhewn that the teſtator by the word "heirs" meant heirs of the body, becauſe *J. Saunders* could not die without heirs ſo long as *J. Taylor* exiſted. On ſimilar grounds *Clatch*'s caſe may have been decided. It was impoſſible that the ſecond limitation to *Thomaſin* ſhould ever take place if *Alice* took an eſtate

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(*a*) By three judges againſt *Dyer*.

in fee by the firſt limitation. For the eſtate being limited to *Alice* and her heirs, if *Alice* died without children living *Thomaſin*, *Thomaſin* the ſiſter would take as heir general of *Alice*: when therefore the teſtator ſays, " if *Alice* die without iſſue living *Thomaſin*", the latter words circumſcribe the former, and ſhew that by the word " heirs" muſt be intended " iſſue". It is probable however that this caſe was determined upon the laſt limitation, " if both daughters ſhall die having no iſſue deviſe over to *J. S.*" It has been argued in this caſe, that it was manifeſtly the teſtator's intention, that the children and grand-children of *S. Saunders* ſhould be benefited. But however that may be, the queſtion is, Whether the teſtator intended that the children and grand-children ſhould be benefited by this will or by ſome diſpoſition to be made by *S. Saunders?* If ſhe had any children living at the time of her death, the eſtate being given to her in fee, ſhe would have abundant power to provide both for children and grand-children. Nothing however is given to them by this will; they are merely named in the deſcription of the contingency on which the eſtate is to go over. It only remains to be conſidered, whether this limitation be within the time allowed to executory deviſes; and that it is, there can be no doubt. With every inclination to make this a contingent remainder, yet unleſs we can conſtrue the deviſe to be to *Phebe Taylor* for life, and in caſe *S. Saunders* ſhall leave children living at her death, then to *S. Saunders* in fee, but if not, then to her for life, remainder over in fee, we muſt hold it to be an executory deviſe. But by the mode of conſtruction to which I have alluded *S. Saunders* would not know at the time when her intereſt commenced, whether ſhe was to have a life-eſtate or a fee. We are bound to hold that the whole fee being given to *S. Saunders* her heirs and aſſigns in remainder, no further remainder over can be limited upon that fee, and that the eſtate given to the leſſor of the Plaintiff is a new fee limited upon a contingency.

HEATH J. I think this caſe clearly falls within the principles laid down in *Pells* v. *Brown*, and has not been taken out of thoſe principles by the arguments which have been employed. A fee having been given to *S. Saunders*, the rule that a limitation ſhall be conſtrued a contingent remainder rather than an executory deviſe cannot apply to the limitation over in this caſe.

ROOKE J. I am of the ſame opinion.

CHAMBRE J. I am of the ſame opinion.

Judgment for the Plaintiff.

1800.

Nov. 25th.

MILLER *v.* COUSINS.

If Defendant's attorney admit in effect, tho' not in terms, that a writ of errror ſued out by him has been brought for delay, the plaintiff is at liberty to proceed on the judgment.

THE Plaintiff in this caſe having ſigned judgment for want of a plea, the Defendant ſued out a writ of error thereon; and the Plaintiff brought an action on the judgment. The Defendant then applied to the Court and obtained a rule *Niſi* to ſtay the Plaintiff's proceedings in the ſecond action, pending the writ of error, he giving judgment in that action, with ſtay of execution, and undertaking not to bring a writ of error thereon.

Bayley, Serjt. in anſwer to the application, produced an affidavit to ſhew that the writ of error was merely for delay, which ſtated that the Defendant's attorney had applied to the Plaintiff's attorney for ſix months time to pay the money due, and for which the action on the judgment was brought, alleging "that unleſs that requeſt was granted the Defendant muſt put himſelf to great expence to obtain that time and in the end muſt go to gaol and thus the Plaintiff would loſe his money" but never intimated that there was any error in the judgment. He cited *Law* v. *Smith*, 4 *T. R.* 436. *n.* (*a*), where on account of a ſimilar declaration of the Defendant's attorney the Court of *King's Bench* refuſed to ſtay proceedings on the Plaintiff's judgment, pending a writ of error brought by the Defendant.

Shepherd, Serjt. *contrà*, inſiſted, that it was not a neceſſary inference from this declaration of the Defendant's attorney, that the writ of error was brought for delay, and that the Court had always held a writ of error a ſtay of proceedings, except in caſes where there has been an unequivocal declaration of its being merely for delay.

But *the Court* held the rule to be, that where the Defendant's attorney has in effect, though not in terms, admitted the writ of error to be brought for delay, there the Plaintiff is notwithſtanding at liberty to proceed on the judgment (*a*).

Rule diſcharged.

(*a*) *Entwiſtle* v. *Shepherd*, 2 *T. R.* 78. and *Maſterman* v. *Grant*, 5 *T. R.* 714. See alſo 1 *Sellon's Pract.* 544. ed. 2. where the authorities on this point are collected.

1800.

Nov. 25th.

PENSON *v.* LEE.

In an action on a policy of inſurance, with a count for money had and received, if the Defendant pay no money into court, but eſtabliſh as a defence that the riſk never commenced, the Plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counſel in opening the caſe. In ſuch caſe neither party is entitled to the coſts of the 1ſt count, but the Plaintiff is entitled to the coſts of the count on which he ſucceeds and ſo much of the expences of the trial as were neceſſarily incurred by him in ſupport of that count.

ASSUMPSIT on a policy of inſurance, with a count for money had and received. The Defendant paid no money into court.

At the trial before Lord *Eldon*, Ch. J. at the Guildhall ſittings after laſt *Eaſter* term, the caſe was opened for the Plaintiff merely on his right to recover upon the policy. The defence ſet up was, that the ſhip was not ſea-worthy: and upon this point, without any direct evidence of fraud, the caſe went to the jury. While they were deliberating upon their verdict, the counſel for the Plaintiff obſerved to his Lordſhip, that in caſe the jury ſhould be of opinion that the ſhip was not ſea-worthy, the Plaintiff would be entitled to a verdict for a return of premium. The jury having no intimation of this claim brought in their verdict generally for the Defendant.

A rule *Niſi* having been obtained upon a former day, to enter a verdict for the premium upon the count for money had and received,

Cockell and *Vaughan*, Serjts. ſhewed cauſe, and admitted that upon inquiry the practice had been found to vary, with reſpect to allowing the Plaintiff to take a verdict for the premium in caſes of this kind, contending that as no mention had been made by the Plaintiff in the opening of his caſe reſpecting the return of premium, under the apprehenſion that ſuch a claim might prejudice the jury againſt him on the principal point, he ought not now to be permitted to ſet it up; that the Defendant had been deprived of the opportunity of conteſting the claim by croſs-examining the Plaintiff's witneſſes, or producing evidence on his own part to eſtabliſh fraud, and that therefore if the Plaintiff were now permitted to inſiſt upon it, he would take advantage of his own wrong. They cited the caſe of *Neſbitt* v. *Whitmore*, *B. R. E.* 40 *Geo.* 3. (*a*) where a caſe having been reſerved for the opinion of the Court, in which no mention was made reſpecting a return of premium, the Court being of opinion with the defendant upon the principal point, did not think proper to direct a verdict to be entered for the Plaintiff for the premium, though to prevent another action being brought they ſubjected the Defendant to the terms of paying the premium to the Plaintiff on having judgment entered for himſelf without

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(*a*) See this caſe mentioned with ſome ſlight difference, 1 *Eaſt. p.* 97. *in notis.*

coſts. They alſo referred to *Mackenzie* v. *Duff*, *Park. Inſur.* 377.

Shepherd, *Lens*, and *Bayley*, Serjts. in ſupport of the rule obſerved, that had they not conſidered it as the conſtant practice for the Plaintiff in ſuch caſes to have a verdict on the count for money had and received, they ſhould have made the claim at an earlier period of the cauſe; that whenever the defence ſet up imports that the riſk never has commenced, it is a conſequence of law that the plaintiff is entitled to a verdict for the return of premium; that if the facts of this caſe had been ſtated on a ſpecial verdict, the Court would have been bound to enter judgment for the Plaintiff. They cited *Burman* v. *Woodbridge*, *Dougl.* 781. and *Rothwell* v. *Cooke*, *ante*, vol. 1. p. 172. and *Hogg* v. *Horner*, *Park. Inſur.* 377. *ed.* 4. to ſhew that the Plaintiff is entitled to a verdict, though the right to a return of premium were never mentioned during the progreſs of the cauſe; and relied on *Neſbitt* v. *Whitmore*, where, although judgment was entered for the Defendant, he had been compelled him to pay the premium to the Plaintiff.

Lord **Eldon** Ch. J. I will ſtate the preſent inclination of my opinion upon this ſubject: but before the caſe is ultimately decided I ſhould wiſh to have ſome converſation with Lord *Kenyon*, and learn whether any or what practice has hitherto prevailed. If any practice has prevailed, it will be unneceſſary to enter into the theory of the ſubject. The Plaintiff's language upon the record is this; I am entitled to recover as for a total loſs, and if I fail in that I am entitled to recover ſo much money as the Defendant withholds from me contrary to good faith. The language of the Defendant is, that he owes nothing upon either demand. If the nature of the defence be ſuch that the Plaintiff muſt *neceſſarily* recover back the premium if he fail in his demand upon the underwriters as for a total loſs, his counſel need not ſtate a ſingle word to the jury reſpecting the return of premium. But if the failure on the greater demand does not *neceſſarily* infer a right to recover upon the leſſer demand, the queſtion will be, Whether if the Plaintiff's counſel confine himſelf to the former, the Defendant's counſel will not have a right to conclude that the latter has been abandoned. The Plaintiff has his choice; he has ſtated two demands upon the record, and he may inſiſt upon both, or upon one only; if he be apprehenſive that ſetting up a claim for the return of premium will prejudice the jury againſt him as to his claim for the total loſs, and therefore ſuffers the cauſe to proceed to its concluſion without ſaying one word about the premium, how is the Defendant's counſel to act? If there be any ſettled practice upon the ſubject, they may conduct themſelves accordingly; but ſuppoſing no ſettled practice to exiſt, they will have loſt the opportunity of croſs-examining the Plaintiff's witneſſes, as well as of producing evidence on their own part, to rebut the demand for a return of premium. Does the defence eſtabliſhed in this caſe neceſſarily infer a right to a return of premium? certainly not, if groſs fraud would have been an anſwer (a). *Primâ facie* the Plaintiff's counſel had nothing to to do but to make the demand; but if groſs fraud had been ſhewn, it will not be admitted that they could have ſucceeded upon that demand: and the queſtion is, Whether it was neceſſary for the Defendant to combat a claim which had never been made? If it was my duty to have ſtated to the jury, that if they found the ſhip not ſea-worthy they muſt give the Plaintiff a verdict for the premium, on the count for money had and received, I do not think that the mere circumſtance of this verdict being found generally for the Defendant ought to conclude the Plaintiff. But if groſs fraud be a material ingredient in ſumming up where a return of premium is demanded, though I will not take upon me to ſay that actual fraud was proved in this caſe, yet I ſhall not have done my duty in not ſtating to the jury that there were circumſtances very material for their conſideration, and that if they amounted on their judgment to groſs fraud, that would overthrow the claim for a return of premium. Suppoſe the Defendant's counſel, upon the demand being ſet up at the concluſion of the trial, had then deſired leave to go into evidence of fraud; could it have been refuſed? The inconvenience will be extreme if the Plaintiff's counſel can be permitted to open as many caſes as they pleaſe *gradatim et ſeriatim.* I do not conceive that this caſe can be decided merely with reference to actions on policies of inſurance; it muſt be decided with reference to all other caſes in which ſeveral demands can be made under the different counts in the declaration. If the practice is already ſettled it muſt prevail; but if it be yet unſettled, I think the Plaintiff ought to be bound by his opening.

HEATH J. If the practice upon this ſubject be ſettled, I ſee no reaſon why the Defendant ſhould complain of ſurprize, for the common and ordinary practice is ſufficient notice to him.

(a) See this point diſcuſſed, *Park. Inſur.* 215—218. and finally ſettled in *Chapman and others* v. *Fraſer*, *B. R. Trin.* 33 *Geo.* 3. *Park. Inſur.* 218.

Rooke, J. I ſhall yield to the practice whatever it may turn out to be. But on principle, it appears to me, that it would be attended with great inconvenience, if the Plaintiff were ſuffered to take a verdict in caſes of this kind. I think that the Plaintiff ought to make a full diſcloſure of his caſe to the jury: the jury only have power to give a verdict for the return of premium; the Court cannot order it. Suppoſe the Plaintiff were to admit that the ſhip was not ſea-worthy, the Court could not refer the caſe to the prothonotary to aſcertain the premium. The Defendant may go into evidence of fraud; and if the demand be capable of being rebutted it ſhould have been ſtated to the jury.

Chambre J. In practice great indulgence is allowed to the counſel in caſes of this ſort. Some inconvenience may perhaps ariſe from not ſtating the whole caſe to the jury in the opening; but juſtice is often better obtained by not holding the counſel too ſtrictly to the ſtatement in the opening. On the part of the Plaintiff all that was neceſſary was proved; and if the Defendant intended to prevent the Plaintiff from recovering the premium he ſhould have proved fraud. The Court indeed ought not to ſuffer the Defendant to be ſurprized, or to preclude him from entering into evidence if he has it in his power. In general every thing is taken to be proved which is not objected to. In drawing up a demurrer to evidence, many facts are ſtated which never were actually given in evidence. If it were not ſo, the buſineſs of the ſittings would be protracted to an intolerable length. The determination of this caſe muſt depend entirely on the practice.

Lord Eldon Ch. J. On this day ſaid—We have made inquiries reſpecting the practice on this ſubject, and find that Lord *Kenyon* is of opinion that in caſes of this kind, the Plaintiff is intitled to a verdict for the premium. Without entering into any reaſoning upon the ſubject, we have only to ſay, that the verdict in this caſe muſt be entered for the Plaintiff on the count for money had and received, but as there may be caſes in which the application of this practice may work injuſtice, we hope that the Plaintiff's counſel will in future demand the premium in his opening where he means to inſiſt upon it on failure of his claim for the loſs.

Per Curiam, Rule abſolute.

Afterwards on the taxation of coſts the prothonotary allowed to the plaintiff the coſts of the count for money had and received on which he had ſucceeded, in doing which he included all the expences attending the trial, but allowed no coſts to either party on the counts upon which the Plaintiff had failed. In conſequence of this a rule *niſi* was obtained calling on the Plaintiff to ſhew cauſe why the prothonotary ſhould not review his taxation and allow coſts to the Defendant on all the counts except that for money had and received.

Shepherd, *Lens*, and *Bayley* Serjts. now ſhewed cauſe, and argued, 1ſt, that the Plaintiff was entitled to all the coſts of the trial ſince he could not have recovered upon the count for money had and received without going into all the circumſtances of the caſe, and that it was no hardſhip upon the Defendant, inaſmuch as he might have ſaved that expence and trouble by paying the premium into Court; 2dly, that according to the caſe of *Spicer* v. *Teaſdale*, *ante*, *p.* 49. where the Plaintiff in this Court recovers upon one count he is entitled to the coſts of all the counts; but even ſuppoſing that practice to have been ſince altered and the rule of the King's Bench to have been adopted (*a*), yet the Defendant could not be entitled to any coſts in a caſe where the Plaintiff has ſucceeded upon one count on the trial of the general iſſue; though where different iſſues were tried it might be otherwiſe.

Cockell and *Vaughan* Serjts. in ſupport of the rule contended, 1ſt, that the Plaintiff's ſucceſs upon the laſt count did not ariſe out of the evidence adduced by the witneſſes on the part of the Plaintiff, but out of the total failure of the Plaintiff on that part of the caſe which it was brought to ſupport and out of the caſe eſtabliſhed by the Defendant; 2dly, that where the Court ſee two ſeparate cauſes of action on record, if the Plaintiff ſucceed on one and the Defendant on the other, they will allow coſts to each party, and that no two cauſes of action could be more diſtinct than thoſe upon which iſſue was taken in this caſe. They referred to *Day* v. *Hanks*, 3 *T. R.* 654. *Braithwaite* v. *Bradford*, 6 *T. R.* 599. and to the caſe in this court *T.* 32 *G.* 3. cited by *Le Blanc* J. 8 *T. R.* 467.

Lord ELDON Ch. J. Subſequent to the caſe of *Spicer* v. *Teaſdale* the Court declared, though whether in ſuch a manner as to be heard by all the bar I will not take upon me to ſay, that the practice of this Court ſhould in future be conformable to that of the *King's Bench*. On this record there are manifeſtly diſtinct

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(*a*) Which the Court intimated to have been the caſe, when the rule *niſi* was obtained.

cauſes of action; and if conſiſtently with the practice of the *King's Bench*, the Court could order the prothonotary to allow coſts to the Plaintiff upon that count only on which he has ſucceeded, and to the Defendant upon the others, I think that we ſhould promote the juſtice of the caſe; but as it appears that the Defendant in a caſe like this would not be allowed his coſts in the *King's Bench*, I am to preſume that the practice of that Court is founded on equity and reaſon. In the preſent inſtance, however, as the prothonotary has taxed the coſts under the ſuppoſition that he was bound to allow all the coſts of the trial to the Plaintiff, the taxation muſt be reviewed. In making his review he will conſider whether the witneſſes adduced by the Plaintiff were *bonâ fide* brought forward to ſupport the count upon which the Plaintiff has recovered either wholly or in part, and will allow for them accordingly; if he ſhall be of opinion that they were not brought forward with the intention of ſupporting that count, either wholly or in part, he will diſallow the coſts reſpecting them altogether.

HEATH J. obſerved, that in the caſe of *Day* v. *Hanks*, the judgment entered for the Plaintiff had been ſuffered by the Defendant to go by default (*a*); and that the Plaintiff who carried down the record to trial failed there altogether.

ROOKE J. concurred.

CHAMBRE J. The caſe of *Day* v. *Hanks* does not apply to this. For in that caſe the Plaintiff had judgment upon an inqueſt of office only, whereas the Defendant had judgment upon the only iſſue that went down to trial. It ſeems to me to be the ſettled practice of the *King's Bench*, that if a trial takes place, and any one iſſue be found for the Plaintiff, he muſt have the general coſts; though on the taxation of thoſe coſts, the officers are authorized to deduct the coſts of all ſuch parts of the pleadings, of ſuch parts of the briefs, and of ſuch witneſſes as are not applicable to the points on which the verdict proceeds.

The prothonotary was ordered to review his taxation on the above principles (*b*).

(*a*) In *Braithwaite* v. *Bradford*, 6 *T. R.* 602. however, *Groſe* J. thought that "if that caſe were conſidered as ſo many rights claimed in different counts, and ſeparate iſſues taken on each, it would fall within the reaſon of the determination in *Day* v. *Hanks*."

(*b*) The caſe moſt analogous to the preſent, is *Butcher* v. *Green*, *Doug.* 678. cited *ante*, p. 50. note (*b*). In that note an obſervation is made on *Butcher* v. *Green*, which obſervation as well as the general inference there drawn from *Day* v. *Hanks*, muſt, after the preſent deciſion, be abandoned

Nov. 25.

BROOKER *v.* SIMPSON.

A joinder in demurrer muſt be ſigned by a Serjeant.

THE Defendant, a priſoner, having demurred and given a rule to join in demurrer, the Plaintiff filed a joinder in demurrer in the office which was not ſigned by a Serjeant; whereupon the Defendant ſigned judgment of *nonpros*; and then obtained a rule to ſhew cauſe why he ſhould not be diſcharged out of cuſtody.

Bayley Serjt. on ſhewing cauſe cited *Hubert* v. Lord *Weymouth*, 2 *Bl.* 816. where the Court held that the replication of *nul tiel record* does not require a Serjeant's hand, and overruled the caſe of *Simſon* v. *Neale*, 2 *Wilſ.* 74. in which the contrary had been decided; he alſo referred to *Ellis* v. *Govey*, *ante*, vol. 1. p. 469. where the Court ſaid that a *ſimiliter* was an exception to the rule, "that where the plea is ſigned by counſel the replication muſt be ſigned alſo," and urged that a joinder in demurrer was a mere *ſimiliter*.

Marſhall Serjt. *contrà*, cited *Douglas* v. *Child*, *E.* 33 *Geo.* 3. (*a*) *C. B.*

The Court (after conferring with the officers) ſaid, that a joinder in demurrer ought to have a Serjeant's hand; for that a Serjeant ought to be met by a Serjeant.

Rule abſolute.

(*a*) *Douglas* v. *Child*, *E.* 33 *Geo.* 3. *C. B.* The Defendant delivered a demurrer without being ſigned by a Serjeant; whereupon the Plaintiff ſigned judgment.

The Court, after hearing *Bond* and *Runnington* Serjts. and having conſidered the point, declared that it would be extremely improper to allow an attorney to ſanction ſo important a ſtep in the cauſe, as that which admits all the facts to be well pleaded on the other ſide. And *Eyre* Ch. J. ſaid, that it would be great preſumption in an attorney to take upon himſelf to decide when a party might demur or *join in demurrer*; and that this could in no caſe be ſuch a matter of courſe that the attorney might do it himſelf.

Nov. 25.

ATKINSON *v.* NEWTON.

Fi. fa. being made returnable on a *King's Bench* return day, inſtead of a *Common Pleas* return day, was amended by the award of execution on the roll.

THE writ of *fieri facias* in this caſe having been made returnable "on the *Thurſday* after the morrow of *All Souls*," which is the return day in the *King's Bench*, inſtead of "on the morrow of *All Souls*," the return day in this Court, croſs motions were made; *viz.* on the part of the Plaintiff to amend, and on the part of the Defendant to ſet aſide the proceedings on the execution for irregularity. Both theſe applications now coming on to be conſidered,

Shepherd Serjt. in ſupport of the former motion cited *Browne* v. *Hammond*, *Barnes*, 10. *Newnham* v. *Law*, 5 *T. R.* 577. *Shaw* v. *Maxwell*, 6 *T. R.* 450. *Bourchier* v. *Little*, 1 *H. Bl.* 291. *Carr* v. *Shaw*, 7 *T. R.* 299. and *Stevenſon* v. *Danvers*, *ante*, p. 109.

Beſt and *Onſlow* Serjts. *contrà*, inſiſted that the Court would not give leave to amend unleſs with a view to further the juſtice of the caſe, which in this inſtance would be defeated by the amendment propoſed. They alſo contended that there was nothing to amend by, and cited *La Roche* v. *Waſbrough*, 2 *T. R.* 737. where the Court in granting leave to amend laid ſtreſs on the circumſtance of their being ſomething by which the miſtake might be amended.

But the other ſide obſerving, that on a reference to the record as now made up, it would appear by the award of execution that the writ was awarded " returnable here on the morrow of *All Souls*, &c." and this being proved by production of the record;

The Court made the rule for amending abſolute, and diſcharged the rule for ſetting aſide the proceedings.

MOUNTFORD *v.* WILLES.

Nov. 27th.

In a contract for the ſale of goods, if any particular time be limited for payment of the price, the vendor is entitled to intereſt on the price from that time.

ACTION for goods bargained and ſold. In ſupport of the Plaintiff's demand, a note of the Defendant's was given in evidence at the trial, requeſting the Plaintiff to furniſh one *W. Julien* with timber to the value of 30 *l.* or thereabouts, for which the Plaintiff undertook to be anſwerable. At the bottom of the note was written, " Credit till *Chriſtmas*." A verdict was found for the Plaintiff which included intereſt on the ſum demanded from the *Chriſtmas* referred to in the note.

Marſhall Serjt. having obtained a rule *niſi* to ſet aſide the verdict and have a new trial on ſome other points which were overruled, now objected that the Plaintiff could not retain the verdict as it included intereſt, which ought not to be given for goods ſold. He cited *Blaney* v. *Hendrick*, 3 *Wilſ.* 205. where though it was ruled that intereſt might be given on an account ſtated from the day on which it was ſtated, yet *Gould*, *Blackſtone*, and *Nares* Js. (*abſente De Grey* Ch. J.) ſaid, that "for money owing for goods ſold and delivered no intereſt ſhall be allowed."

But *the Court* held that the Plaintiff was entitled to intereſt from the period mentioned in the note.

Rule diſcharged.

Nov. 27th.

ELLIOT and Others *v.* DAVIS.

A. executed a bond as the joint and ſeveral bond of himſelf and *B.* and ſigned it "*A.* and *B.*" having no authority from *B.* ſo to do. Held that the bond was good as the ſeveral bond of *A.*

DEBT on bond. Plea *non eſt factum.*

At the trial before Lord *Eldon* Ch. J. it appeared that the bond in queſtion was given to the Plaintiffs by the Defendant as ſurety for a third perſon; that previous to its execution, the Defendant having brought the bond to the Plaintiff's counting-houſe filled up with his own name only as a ſurety, it was objected on the part of the Plaintiffs that they meant to have the joint ſecurity of the Defendant and his partner, one *Marſh*; that upon this objection being made the bond was, with the conſent of the Defendant, but in the abſence of *Marſh*, altered into a joint and ſeveral bond in the names of the Defendant and *Marſh*, and being ſigned by the Defendant "*Davis* and *Marſh*" was by the former regularly ſealed and delivered as his deed; and that *Marſh* on being informed of the tranſaction, expreſſed his diſapprobation of what the Defendant had done. Upon this evidence it was inſiſted on the part of the Defendant that there was no regular ſingle execution of the bond, there being but one ſeal, againſt which were ſet the names of "*Davis* and *Marſh*," and that the execution therefore being inſufficient as againſt both, was inſufficient alſo as againſt the Defendant. A verdict was found for the Plaintiffs, with leave to the Defendant to move to have that verdict ſet aſide and a nonſuit entered. Accordingly a rule *niſi* having been obtained for that purpoſe on a former day,

Cockell Serjt. now ſhewed cauſe and contended that the bond was well executed as againſt the Defendant, the ſigning being immaterial, as appears from the form of pleading, where the ſealing and delivery only are averred, both which latter acts the Defendant alone performed. He cited *Cromwell* v. *Grunſden*, 2 *Salk.* 462. 1 *Lord Raymond*, 335. S. C. where the Plaintiff having declared on a bond of the Defendant's teſtator *Robert Erlin* and it appearing to have been ſigned "*Robert Erlwin*," the Court on an objection taken ſaid "the variance between the name ſigned which is *Erlwin* and the name in the obligation which is *Erlin*, is not material, becauſe ſubſcribing is no eſſential part of the deed, ſealing is ſufficient."

Sellon Serjt. in ſupport of the rule inſiſted, that though ſignature might not be neceſſary to the validity of a bond, ſtill if any ſignature be actually put to it, the parties to the bond muſt abide by that ſignature; that in this caſe the alteration in the bond was made at the inſtance of the Plaintiffs, who having at the time the Defendant entered into this engagement refuſed to take his ſingle ſecurity, ought not now to be allowed to reſort to him alone, ſince if it had been a good joint and ſeveral bond, he would have been entitled to contribution from his co-ſurety (*a*).

Lord Eldon Ch. J. The alteration which was made in the bond appears to have been as much the act of the Defendant as of the Plaintiff, ſo that no argument in his favour can be drawn from that circumſtance. His ſingle ſecurity being objected to, he offered to execute a bond for himſelf and his partner *Marſh*, having no authority from the latter to bind him. The way in which this obligation begins is this, "Know all men by theſe preſents I *T. Davis* and *G. Marſh*" &c. The Defendant meant it to be his ſeveral bond, and the joint and ſeveral bond of himſelf and *Marſh*. Having had no authority to bind *Marſh*, the bond becomes the ſeveral bond of the Defendant, but not the joint and ſeveral bond of himſelf and *Marſh*. The bond being ſealed and delivered is ſufficient, and we would, if it were neceſſary, hold him to have deſcribed himſelf by the name of "*T. Davis* and *G. Marſh*," and to be eſtopped from ſhewing that his name is *T. Davis* only.

The other Judges concurring in opinion,

Rule diſcharged.

(*a*) See *Cowell* v. *Edwards*, *ante*, 268. and *Deering* v. *Lord Winchelſea*, *ante.*, 270.

Smith *v.* Tyson.

Nov. 27th.

If an affidavit to hold to bail made by the Plaintiff's clerk expreſsly negative a tender in bank notes, it is bad: for a clerk cannot have certain knowledge of a mere negative.

The Defendant in this caſe was holden to bail on an affidavit made by the Plaintiff's clerk, who ſwore poſitively to the debt, "and that no offer or tender had been made to the ſaid Plaintiff to pay the ſame or any part thereof in notes of the governor and company of the Bank of *England* expreſſed to be payable on demand."

Onſlow Serjt. having obtained a rule *niſi* for diſcharging the Defendant on a common appearance on the ground of the tender in bank-notes having been expreſsly negatived by a clerk, whereas that fact could not be ſufficiently within his knowledge to warrant the affidavit;

Bayley Serjt. *contrà*, inſiſted that the affidavit being poſitive was ſufficient, for that if it was falſe the clerk was indictable for perjury, and that a poſitive affidavit of the debt by a clerk had been held good.

Chambre J. obſerved that a clerk may have knowledge of a debt being due to his maſter, that being a certain fact, and if that debt has been diſcharged it is matter of defence; but that in this caſe the clerk had alſo ſworn to a mere negative, of which he could have no certain knowledge.

The Court were of opinion that the affidavit was bad, and refuſed to allow a ſupplemental affidavit.

Rule abſolute.

(*a*) If the clerk had negatived the tender *according to the beſt of his knowledge and belief* it would have been equally bad in this caſe. *Caſs* v. *Levi*, 8 *T. R.* 520. Though if the Plaintiff had been abroad it ſhould ſeem that ſuch an affidavit by the clerk would have been ſufficient. See *Munro* v. *Spinks*, 8 *T. R.* 284. where the agent of a Plaintiff abroad ſwore poſitively to the debt, and negatived the tender in bank notes according to the beſt of his knowledge and belief.

Nov. 28th.

RUSHTON *v.* CHAPMAN.

The day inſerted in the notice to appear to a *common capias* muſt be the return day of the writ.

THE Defendant in this caſe was ſerved with a common capias, returnable in fifteen days of the *Holy Trinity*, (the 22d of *June*,) to which a notice was ſubjoined to "appear in his Majeſty's Court of Common Pleas at the return thereof being the 25th Day of *June*," which was the *quarto die poſt*. A rule was obtained calling on the Plaintiff to ſhew cauſe why the proceedings ſhould not be ſet aſide for irregularity; and the caſe was mentioned ſeveral times in this term.

Beſt Serjt. in ſupport of the rule relied upon the words of the 5 *Geo.* 2. *c.* 27. *ſ.* 4. and the conſtant practice of the Court antecedent to the caſe of *Sumner* v. *Brady* in 1791, 1 *H. Bl.* 630; with reſpect to which caſe he obſerved, that as the proceedings there appeared by the report to have been founded upon an origi-

1800.

Rushton *v.* Chapman.

nal *clauſum fregit*, the ſtatute did not apply, and added, that as the Defendant, after having received notice to appear at the return, could not be in contempt until the *quarto die poſt*, he would be deprived of the latitude which the law allows, if the Plaintiff were permitted to give notice for him to appear on that very day upon which if he does not come in he will be in contempt.

The officers reported to the Court, that upon ſearch made it appeared that the proceſs in *Sumner* v. *Brady* was a common *capias*.

Runnington Serjt. in ſhewing cauſe relied on the authority of *Sumner* v. *Brady*, and adopted the reaſoning there made uſe of, that the *quarto die poſt* is to be conſidered as the effectual return day, and that the notice would be equally good whether the return day or the *quarto die poſt* were inſerted.

Lord **Eldon** Ch. J. upon the argument inclined to think that it was impoſſible for the Court to hold that the notice would be equally good either way, for that the words of the act of parliament muſt be taken to mean one day or the other; and if the ſummons in this caſe was good, a notice in which the words of the act were ſtrictly followed and the return day inſerted muſt be bad.

On this day his Lordſhip ſaid :—We underſtand that the practice of the Court has been to ſupport notices ſimilar to the preſent. If that had not been the practice I ſhould have entertained doubts upon the caſe. My brothers however are diſpoſed to think that in future at leaſt that practice ought to be altered, and that thoſe notices will be more conformable to the act of parliament if they are drawn up according to the practice which exiſted previous to the caſe of *Sumner* v. *Brady*. We deſire therefore it may be underſtood that the Court now orders that in future the return day be inſerted in the notice.

Per Curiam. Rule diſcharged.

HOLLAND *v.* WHITE.

Nov. 28th.

If the rule of allowance of bail be not ſerved on the Plaintiff's attorney, he may take an aſſignment of the bail bond, though he knows of the juſtification.

In this caſe the ſon of the Plaintiff's attorney was preſent in Court when the bail juſtified, but the Plaintiff's attorney, not having been ſerved in time with a rule allowing the juſtification, took an aſſignment of the bail-bond and proceeded thereon. To ſet aſide this aſſignment and the proceedings thereon a rule *niſi* was obtained;

1800.

Holland *v.* White.

Againſt which *Runnington* Serjt. now ſhewed cauſe, and cited *The King* v. *The Sheriff of Middleſex*, 4 *T. R.* 493. and *Roberts* v. *Gilbert*, *E.* 34 *Geo.* 3. *C. B.* to ſhew that the rule allowing the juſtification muſt be actually ſerved although the Plaintiff's attorney be preſent at the juſtification.

Clayton Serjt. was proceeding to ſupport the rule *niſi*, and obſerved that no fraud had been practiſed on the revenue (*a*), inaſmuch as the rule had been actually drawn up, though not ſerved in time.

But *the Court* on reference to the officers finding the practice to be as ſtated on the part of the Plaintiff, and that it proceeded not only on the ground of protecting the revenue, but alſo on the notion that the Defendant muſt be taken to have waved his juſtification unleſs he ſerve the rule for the allowance,

Diſcharged the Rule.

(*a*) In *The King* v. *The Sheriff of Middleſex* the Court ſaid they were bound to take care that the revenue was not defrauded.

THE END OF MICHAELMAS TERM.

CASES

1801.

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Hilary Term,

In the Forty-firſt Year of the Reign of GEORGE III.

HILL, one, &c. *v.* HUMPHREYS.

Jan. 27th.

THE Plaintiff in this caſe having brought an action to recover the amount of a bill for buſineſs done by him as attorney to the Defendant, the cauſe came on to be tried before Lord *Eldon* Ch. J. at the *Weſtminſter* Sittings after laſt *Michaelmas* Term. On the part of the Plaintiff it was proved, that a month before the commencement of the action, a copy of the bill ſigned according to the ſtatute had been left at the Defendant's compting-houſe. Upon this his Lordſhip nonſuited the Plaintiff, obſerving, that as the Stat. 2 *Geo.* 2. *c.* 23. requires that the bill ſhould either be delivered to the party perſonally, "or left at his dwelling or laſt "place of abode" a month before the commencement of the action, the terms of that act had not been complied with by a delivery at the compting-houſe of the Defendant. Liberty however was given to the Plaintiff to move that the nonſuit might be ſet aſide.

Delivery of an attorney's bill at the compting-houſe of his client one month before the commencement of an action upon the bill, is not a good delivery within the 2 *Geo.* 2. *c.* 23. s. 23. If an attorney introduce into his bill certain *items* connected with his profeſſional capacity though not immediately within the terms of the 2 *Geo.* 2. *c.* 23., and in an action upon the bill fail becauſe it was not properly delivered according to the directions of the ſtatute, he muſt fail altogether, and will not be allowed to recover for ſuch *items* only.—*Quære*, Whether the ſame rule would not prevail if ſuch *items* were not at all connected with his profeſſional capacity.

1801.

Hill v. Humphreys.

The counſel for the Plaintiff did not think it worth while to controvert the above deciſion; but having afterwards diſcovered that the bill contained two *items* which could not be conſidered as "fees, charges, or diſburſements at law, or in equity," within the meaning of the ſtatute, *viz.* 9*l.* for coſts paid upon a diſcontinuance, and 2*l.* 13*s.* 4*d.* for preparing a caſe and laying it before a ſpecial pleader; they obtained a rule to ſhew cauſe why a verdict ſhould not be entered for the Plaintiff for thoſe two ſums.

Shepherd, *Marſhall*, and *Vaughan*, Serjts. in ſupport of the rule contended, that the *items* in queſtion not being taxable, the Plaintiff was therefore intitled to recover upon them without the previous delivery of a bill; that although they might have become the ſubject of taxation if inſerted together with taxable *items* in a bill which had been regularly delivered, yet as the ground of the defence in this caſe was, that no delivery had been made, it was not competent to the Defendant to ſay, that the bill had been delivered for the purpoſe of rendering theſe *items* ſubject to taxation, but that it had not been delivered for the purpoſe of defeating the plaintiff's right to recover upon it. They cited a caſe of *Lloyd* v. *Mead*, *cor. Buller* J. *Eaſter* 1787, which was an action by the ſolicitor to a commiſſion of bankrupt for the amount of his bill; the defence was, that no bill had been delivered, but it appearing that the bill among other *items* contained one of 7*l.* 10*s.* for money paid to the meſſenger, *Buller*, J. held, that the Plaintiff was entitled to recover upon that *item;* for although the money was expended becauſe he was attorney, yet he did not expend it as attorney. They alſo relied on *Miller* v. *Towers*, *Peake*, *N. P. Caſes* 102. where Lord *Kenyon* allowed the Plaintiff to give evidence of conveyancing buſineſs, though he was precluded from recovering upon the reſt of his demand, on account of having omitted to deliver a bill according to the ſtatute.

Cockell and *Beſt*, Serjts. after inſiſting that as the point was not made at the trial it could not now affect the nonſuit, urged that it was not competent to the Plaintiff to ſever his demand; that as one part of it conſiſted of taxable matter, the whole became ſubject to the juriſdiction of the prothonotary, and that the plaintiff therefore could not recover upon any part without a previous delivery of a bill under the ſtatute. They cited *Winter* v. *Payne*, 6 *Term Rep.* 645. in which it was admitted, that if any one *item* of the bill was taxable the Plaintiff muſt fail *in toto*, ſince no bill had been delivered according to the ſtatute; and alſo a caſe of

Benton v. *Garcia*, *cor. Heath*, J. Spring aſſizes for *Kingſton* 1800. where the Plaintiff having delivered a bill containing ſome *items* which were taxable, and ſome which were not, brought his action before a month had expired from the delivery, but the learned Judge held that the plaintiff could not recover for any part.

Lord Eldon Ch. J.—In this caſe the queſtion does not ariſe on the payment of money for the Defendant's uſe reſpecting which the Plaintiff was not called upon to exerciſe his ſkill and knowledge as attorney; but it ariſes upon the payment of certain ſums reſpecting which the Plaintiff was called upon as attorney in a cauſe to exerciſe his judgment and adviſe his client. The rule which has been adopted concerning charges for conveyancing either ſtands upon no principle, or it decides this caſe. The expences of conveyancing as ſuch are not taxable; they are not to be conſidered as "fees, charges, or diſburſements at law or in equity;" but if one ſingle *item* which may be ſo conſidered, though to the amount of 3*s.* 4*d.* only, is to be found in the bill, the Plaintiff cannot recover for the conveyancing without a delivery of ſuch bill; for in ſuch caſe the charges for conveyancing fall within the rule of the ſtatute. And on theſe principles; namely, that what is paid for conveyancing is paid in the character, and in the exerciſe of the duties of an attorney; that a perſon ſhall not ſplit the demand which he has in the character of an attorney; and that the ſtatute attaches upon the whole demand which he has in that character. If that be ſo, how are the charges of conveyancing to be diſtinguiſhed from the two *items* in the preſent caſe. In the caſe of *Miller* v. *Towers*, as no bill had been delivered the Plaintiff was not allowed to recover the coſts out of pocket; but as no bill had been delivered Lord *Kenyon* felt himſelf at liberty to conſider the demand for conveyancing in the nature of a demand made in an action for conveyancing only. Had any bill been delivered the coſts out of pocket would have appeared upon the face of that bill, and theſe coſts being taxable, the expences of conveyancing contained in the ſame bill, muſt according to all the authorities, have followed the ſame fate. I do not enter into the queſtion, whether if any *items* not connected with the profeſſion of an attorney had been included in this bill, the Plaintiff would have been precluded from recovering upon them. Perhaps however we ſhould not feel great difficulty in holding, that an attorney who inſerts his whole demand upon his client in a bill containing taxable *items*, ſhall be taken to agree that he will not bring an action upon any part of ſuch demand until the bill has been delivered a month. Had the point now made been taken at the trial, I ſhould have thought myſelf bound to hold that theſe were *items* fit to be inſerted in a taxable bill, and that as the bill was not properly delivered they muſt be nonſuited upon the whole contents.

Heath, Rooke, and **Chambre,** Juſtices, concurring,

Rule diſcharged.

Jan. 27th.

Astley *v.* Frances Weldon.

By articles of agreement between the Plaintiff and Defendant it was agreed on the part of the former that he ſhould pay the latter ſo much *per* week to perform at his theatres, with her travelling expences of removing from one theatre to another except *extrà* baggage; and on the part of the Defendant, that ſhe ſhould perform at the theatres ſuch things as ſhe ſhould be required by the Plaintiff, and attend at the theatre beyond the uſual hours on any emergency and at rehearſals or be ſubject to ſuch fines as are eſtabliſhed at the theatres, and be at the theatre half an hour before the performances begin and abide by the regulations of the theatres and pay all fines; and it was agreed by both parties that "either of them neglecting to perform that agreement ſhould pay to the other 200*l.*" *Aſſumpſit* upon this agreement ſtating ſeveral breaches, and concluding to the Plaintiff's damage of 200*l.*—Held that the ſum mentioned in the agreement was in the nature of a penalty, not of liquidated damages.

Assumpsit. The declaration ſtated an agreement between the Plaintiff and the Defendant, whereby the Plaintiff in conſideration of the ſervices of the Defendant therein after mentioned, agreed to pay her during the term of three years the ſum of 1*l.* 11*s.* 6*d.* *per* week, and to pay her travelling expences in her removal at the uſual ſeaſons of the year from the Plaintiff's Theatres in *London*, *Liverpool*, and *Dublin*, or elſewhere, ſave and except her *extrà* luggage, which was to be paid for by herſelf, and the Defendant in conſideration of ſuch weekly ſalary agreed, that ſhe would during the ſaid term of three years "at the uſual and accuſtomed time or times in each day and at all other times when required by the Plaintiff or his aſſigns to the beſt of her judgment power and ability do and perform on the reſpective theatres of the ſaid Plaintiff all and every ſuch matters and things as might from time to time be required of her as a performer or otherwiſe by the ſaid Plaintiff or his aſſigns in the ſeveral public performances to be from time to time exhibited on the ſeveral ſtages of the reſpective theatres of the ſaid Plaintiff either in *England Ireland* or *Scotland* when and as often as need or occaſion ſhould be or require and when directed or requeſted thereto by the ſaid Plaintiff or his aſſigns; he the ſaid Plaintiff thereby agreeing to find fit and proper theatrical dreſſes for the occaſion; And likewiſe it was thereby further covenanted and agreed on between the parties aforeſaid that ſhe the ſaid defendant ſhould and would during the ſaid term thereby agreed on over and above the uſual and cuſtomary hours of attendance and on any

1801.
Astley
v.
Weldon.

emergent occaſion attend as well as aſſiſt at either of the ſaid theatres of the ſaid Plaintiff in forwarding the ſeveral performances as well as attend all rehearſals at the reſpective theatres of the ſaid Plaintiff or ſubject herſelf to the payment of the fines and forfeitures eſtabliſhed in the reſpective theatres; And alſo that the ſaid Defendant ſhould and would on every night's public performance at the reſpective theatres and before the performance attend and be there at leaſt one half hour before ſuch public performance ſhould begin unleſs permiſſion ſhould be had and obtained from the ſaid plaintiff or his aſſigns in writing to the contrary; And alſo that the ſaid Defendant ſhould in all things conform to and duly comply with and abide by the ſeveral rules and regulations of the reſpective theatres in every reſpect in common with the ſeveral performers employed therein; and likewiſe pay all fine or fines that might become due and payable by means of any forfeiture or other matter cauſe or thing whatſoever;" Provided that the Plaintiff ſhould have power to determine the agreement by notice in writing, and that if any of his theatres ſhould be ſhut on particular occaſions therein ſpecified or the Defendant ſhould be prevented from attending, the Plaintiff ſhould be at liberty to deduct a proportionable part of her ſalary, and that if the Plaintiff ſhould be minded to ſhut up his theatres ſooner than the uſual ſeaſon, for a period not exceeding a month, he ſhould be at liberty to ſtop the Defendant's ſalary, ſhe being at liberty to perform elſewhere; but that if either of his theatres ſhould remain ſhut for more than a month during the uſual ſeaſon, then the agreement ſhould be at an end; "And laſtly it was thereby agreed on by and between the ſaid parties that either of them neglecting to perform that agreement according to the tenor and effect and the true intent and meaning thereof ſhould pay to the other of them the full ſum of 200*l.* of lawful money of *Great Britain* to be recovered in any of his majeſty's courts of record at *Weſtminſter.*" The declaration then ſtated, that in conſideration that the Plaintiff had undertaken to perform all things in the ſaid agreement on his part to be performed the Defendant undertook to perform all things therein on her part to be performed, by virtue of which agreement the Defendant was afterwards received into the Plaintiff's ſervice on the terms therein mentioned. It then averred, that although the Plaintiff was willing that the Defendant ſhould remain in his ſervice during the whole term and had performed every thing on his part to be performed yet (pro-

1801.

ASTLEY
v.
WELDON.

teſting that the Defendant had performed nothing on her part to be performed) the Defendant did not during ſuch part of the ſaid term of three years as was then elapſed, at the uſual and accuſtomed times, &c. (in the words of her agreement) perform at the Plaintiff's theatres, but on the contrary thereof on &c. at &c. refuſed to perform ſuch things as were exhibited on the ſtage of one of the theatres in the ſaid agreement mentioned, to wit &c. notwithſtanding the Plaintiff had provided proper theatrical dreſſes, contrary to the form and effect of the ſaid articles of agreement and the promiſe and undertaking of the ſaid Defendant ſo by her made as aforeſaid and in breach and violation thereof; And further that the Defendant did not attend at the reſpective theatres half an hour before the reſpective performances began, but on the contrary refuſed to attend and abſented herſelf without leave, contrary to the form and effect &c; And further that the Defendant voluntarily withdrew herſelf from the ſervice of the Plaintiff for a long time during which ſhe refuſed to perform at his theatres in the public performances which were legally exhibited during that period, contrary to the form and effect, &c. "By means of which ſaid premiſes and by force of the articles of agreement and the promiſe and undertaking of the defendant ſo by her made as aforeſaid ſhe became liable to pay to the plaintiff the ſum of 200*l.* in the ſaid articles mentioned" of which ſhe had notice and was requeſted to pay, but refuſed &c. to the Plaintiffs damage of 200*l.*

Plea, *Non aſſumpſit.*

The cauſe was tried before Lord *Eldon* Ch. J. at the *Weſtminſter* Sittings in laſt *Trinity* Term, when the agreement having been proved, and that the Defendant abſented herſelf from the theatre, and evidence having been adduced to ſhew that by the regulations of the theatre the performers are ſubject to certain ſmall fines for late attendance, inebriety, &c. a verdict was found for the Plaintiff with 20*l.* damages; but liberty was reſerved to the Plaintiff to enter a verdict for 200*l.* if the Court ſhould be of opinion that the ſum of 200*l.* mentioned in the agreement was to be conſidered in the nature of liquidated damages.

A rule *niſi* for that purpoſe having been obtained accordingly,

Shepherd and *Beſt*, Serjts. now argued, in ſupport of the rule, that it appeared from the tenor of the articles to have been the intention of the parties that the 200*l.* ſhould be conſidered as liquidated damages; that in thoſe caſes where particular fines were impoſed by the laws of the theatre, thoſe fines were to be conſidered as the damages agreed to be paid; but for the breach of the articles in every other inſtance, the ſum of 200*l.* was agreed to be paid, without regard to the quantum of injury which the particular breach might have created; that theſe articles reſembled ſome Acts of Parliament in which ſpecific penalties being impoſed in particular clauſes, and a general penalty given at the end, the general penalty operates upon all breaches of the act to which no ſpecific penalties have been annexed; that in many caſes it might be advantageous to the Defendant that the ſum of 200*l.* ſhould be conſidered as liquidated damages, ſince it might be worth while for her to pay that ſum in order to be releaſed from her engagement, whereas if it were not ſo conſidered it would be impoſſible for her to quit the Plaintiff's ſervice without being liable to a new action for every day's abſence; and that it appeared from the nature of the agreement to have been the intention of the parties that upon payment by either of them to the other of 200*l.* they ſhould be releaſed altogether; they cited the opinion of Lord *Somers*, mentioned *Prec. in Chan.* 487. "that where the party might be put in as good a plight as where the condition itſelf was literally performed, there the Court of *Chancery* would relieve though the letter of it were not ſtrictly performed, as payment of money &c. but where the condition was collateral and no recompence or value could be put on the breach of it there no relief could be had for the breach of it;" and relied upon the following caſes, *viz. Ponſonby* v. *Adams*, 6 *Brown Parl. Caſ.* 417. where it was covenanted, that if the tenant failed to reſide on an eſtate in *Ireland* leaſed to him, his rent ſhould riſe from 125*l.* to 150*l.* and it was decreed that the 25*l.* additional rent was to be conſidered as liquidated damages; *Rolfe* v. *Peterſon*, 6 *Brown Parl. Caſ.* 470, where the ſame doctrine was laid down reſpecting a covenant that the tenant ſhould pay 5*l. per annum* for every acre broken up and converted into tillage; *Lowe* v. *Peers*, 4 *Burr.* 2229, where the ſame was holden of a promiſe to pay 1000*l.* if the Defendant married any woman except the Plaintiff; and *Fletcher* v. *Dyche*, 2 *Term Rep.* 32. where the Plaintiff having agreed to perform certain work, and that if he did not do it in a certain time, he ſhould "forfeit and pay to the Defendant the ſum of 10*l.* for every week after the time agreed upon," the Court allowed the 10*l. per* week to be ſet off by the Defendant as liquidated damages, in an action on a bond brought againſt him by the Plaintiff.

Vaughan Serjt. *contrà* obſerved, that the Plaintiff by aſſigning ſeveral breaches in his declaration had ſhewn that he conſidered the ſum contained in the articles in the nature of a penalty out of which he was to recover to the amount of the injury actually ſuſtained; and that the ſame appeared from the articles themſelves, in which a number of ſtipulations of different degrees of importance were inſerted, and for the breach of which very different ſums muſt have been intended to be paid: he mentioned *Sloman* v. *Walter*, 1 *Brown Chan. Caſ.* 418. where Lord Chancellor *Thurlow* held that a bond having been entered into by the Plaintiff to the Defendant in the penalty of 500 *l.* to ſecure to the former, the uſe of a room in the *Chapter Coffee-houſe*, the penalty being merely to ſecure the enjoyment of a collateral object, nothing but the damage actually ſuſtained by breach of the agreement could be recovered; and alſo *Hardy* v. *Martin*, *ibid.* 419 *in notis*, where a brandy-merchant having purchaſed of his partner the good-will of the ſhop, and the latter having entered into a bond in the penalty of 600*l.* not to ſell any brandy within five miles of the place, on payment of the damage actually ſuſtained, the Plaintiff was reſtrained by the Court of *Chancery* from taking out execution for the penalty.

Lord ELDON Ch. J.—When this cauſe came before me at *Niſi Prius*, I felt as I have often done before in conſidering the various caſes on this head, much embarraſſed in aſcertaining the principle upon which thoſe caſes were founded: but it appeared to me that the articles in this caſe furniſhed a more ſatisfactory ground for determining whether the ſum of money therein mentioned ought to be conſidered in the nature of a penalty or of liquidated damages than moſt others which I had met with. What was urged in the courſe of the argument has ever appeared to me to be the cleareſt principle, *viz.* that where a doubt is ſtated whether the ſum inſerted be intended as a penalty or not, if a certain damage leſs than that ſum is made payable upon the face of the ſame inſtrument, in caſe the act intended to be prohibited be done, that ſum ſhall be conſtrued to be a penalty. The caſe of *Sloman* v. *Walter* did not ſtand in need of this principle: for there by the very form of the inſtrument the ſum appeared to be a penalty; in which caſe a Court of Equity could never conſider it as liquidated damages, but muſt

direct

direct an iſſue of *quantum damnificatus*. A principle has been ſaid to have been ſtated in ſeveral caſes, the adoption of which one cannot but lament, namely that if the ſum would be very enormous and exceſſive conſidered as liquidated damages, it ſhall be taken to be a penalty though agreed to be paid in the form of contract. This has been ſaid to have been ſtated in *Rolfe* v. *Peterſon* where the tenant was reſtrained from ſtubbing up timber. But nothing can be more obvious than that a perſon may ſet an extraordinary value upon a particular piece of land, or wood, on account of the amuſement which it may afford him. In this country a man has a right to ſecure to himſelf a property in his amuſements: and if he chooſe to ſtipulate for 5*l.* or 50*l.* additional rent upon every acre of furze broken up, or for any given ſum of money upon every load of wood cut and ſtubbed up, I ſee nothing irrational in ſuch a contract; and it appears to me extremely difficult to apply with propriety the word "exceſſive" to the terms in which parties chooſe to contract with each other. There is indeed a claſs of caſes in which Courts of Equity have reſcinded contracts on the ground of their being unequal. It has been held however that mere inequality is not a ground of relief; the inequality muſt be ſo groſs that a man would ſtart at the bare mention of it. Neceſſity in theſe caſes ſeems to have obliged the Courts to admit a principle nearly as looſe as that to which I have before alluded. But with reſpect to the caſe of *Ponſonby* v. *Adams* the landlord may have ſet a value upon the reſidence of a particular tenant on his eſtate; and why ſhould he not upon that ground have ſtipulated that if ſuch tenant ſhould ceaſe to reſide there his rent ſhould riſe to 150*l.*? Both in *Rolfe* and *Peterſon* and in *Ponſonby* v. *Adams* I ſhould have ſaid, that what was matter of contract bottomed on a good conſideration, ſhould not be looked upon as penalty, but ſhould be conſidered as rent reſerved, or liquidated damages. In *Lowe* v. *Peers* it is quite clear that the breach of promiſe of marriage was to be compenſated for in damages: it was a contract that in caſe the party failed to perform his promiſe he ſhould pay the ſum of 1000*l.* The caſe of *Fletcher* v. *Dyche* is very ſtrongly to the preſent purpoſe. In that caſe a bond in a penal ſum was conditioned to perform certain work within a certain time, or to pay 10*l.* for every week beyond that time. The 10*l.* *per* week was ſecured by the penalty of the bond: and to have ſaid, that one term of a contract ſecured by a penal ſum, ſhould alſo be a penal ſum, would have been abſurd. Indeed Lord *Hardwicke* in *Roy* v. *The Duke of Beaufort* (*a*) was of opinion, that a perſon who had entered into a bond with a penalty of 100*l.* if he poached, muſt have paid the 100*l.* if he had committed any act which amounted to poaching. But ſuppoſe the Duke had taken a bond in a penalty of 100*l.* with condition that the obligor ſhould not kill a partridge, or if he did, that he ſhould pay 5*l.* in that caſe it is moſt clear that the 5*l.* muſt have been conſidered as liquidated damages. With reſpect to the caſe of *Hardy* v. *Martin*, I do not underſtand why one brandy merchant who purchaſes the leaſe and goodwill of a ſhop from another may not make it matter of agreement, that if the vendor trade in brandy within a certain diſtance, he ſhall pay 600*l.*; and why the party violating ſuch agreement ſhould not be bound to pay the ſum agreed for, though if ſuch agreement be entered into in the form of a bond with a penalty, it may perhaps make a difference. I much wiſh, that the principle laid down by Lord *Somers* in *Prec. in Chan.* had been adhered to. Let us then ſee what this caſe amounts to. It was contended at the trial that the laſt clauſe is not in the form of a penal bond. It is thus "and laſtly it is hereby agreed that either party failing to perform their undertaking ſhall pay to the other 200*l.*" *Primâ facie* this certainly is contract, and not penalty; but we muſt look to the whole inſtrument. In conſideration of the Defendant's ſervices the Plaintiff undertakes to pay her 1*l.* 11*s.* 6*d.* *per* week, and alſo her travelling expences. It would be abſurd to hold that, becauſe the 1*l.* 11*s.* 6*d.* is a liquidated ſum, therefore the Plaintiff could not be called upon for more, and yet that in conſequence of his non-payment of the Defendant's travelling expences he ſhould be liable to the whole ſum of 200*l.* becauſe thoſe expences are not aſcertained. Again, there are many inſtances of the Defendant's miſ-conduct which are made the ſubjects of ſpecific fines by the laws of the theatre. Are we then to hold, that if the Defendant happens to offend in a caſe which has been ſo provided for by thoſe laws ſhe ſhall pay only 2*s.* 6*d.* or 5*s.*, but if ſhe offend in a caſe which has not been ſo provided for, ſhe ſhall pay 200*l.* I can find nothing in theſe articles which can ſatisfy my mind judicially, that the 200*l.* is to be paid in one caſe and not in the other. The clauſe is general and contains no exception. If that

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(*a*) 2 *Atk.* 190.

be ſo, the caſe of *Fletcher* v. *Dyche* is an authority ſtrongly in point. It therefore does appear to me that the true effect of this agreement is, to give the Plaintiff his option either to proceed upon the covenants *toties quoties*, or upon the firſt breach to proceed at once for the 200*l.* out of which he may be ſatisfied for the damage actually ſuſtained, and which may ſtand as a ſecurity for future breaches.

HEATH J.—I am of the ſame opinion. It is very difficult to lay down any general principle in caſes of this kind; but I think there is one which may be ſafely ſtated. Where articles contain covenants for the performance of ſeveral things and then one large ſum is ſtated at the end to be paid upon breach of performance, that muſt be conſidered as a penalty. But where it is agreed that if a party do ſuch a particular thing ſuch a ſum ſhall be paid by him, there the ſum ſtated may be treated as liquidated damages. In *Rolfe* v. *Peterſon* it was held that the ſum mentioned was in the nature of increaſed rent, becauſe it was ſaid that the tenant was liable to diſtreſs. But if the tenant had only covenanted generally not to cut down the furze, and at the end of the leaſe a ſum of money had been inſerted to be paid in caſe of breach of performance of the covenants, that ſum would have been in the nature of a penalty. It is a well known rule in equity, that if a mortgage covenant be to pay 5*l. per cent.* and if the intereſt be paid on certain days then to be reduced to 4*l. per cent.* the Court of Chancery will not relieve if the early day be ſuffered to paſs without payment; but if the covenant be to pay 4 *l. per cent.* and if the party do not pay at a certain time it ſhall be raiſed to 5*l.* there the Court of Chancery will relieve. In the preſent caſe, by the laws of the theatre, the Defendant was to pay a ſmall ſum in every caſe of abſence, which proves that the ſum to ſecure performance of the articles muſt be conſidered in the nature of a penalty.

ROOKE J.—The determination of the Court in conſtruing this inſtrument muſt be guided by the intention of the parties. Now it appears very clearly from the ſtipulation that ſmall ſums of money ſhould be paid in certain caſes, that the parties conſidered the larger ſum as a penalty. The caſe of *Fletcher* v. *Dyche* is very ſtrong upon this head; and is not to be diſtinguiſhed from the preſent caſe.

CHAMBRE J.—Though this in point of form is an action for damages, yet if the parties are to be conſidered as having ſtipulated for

1801.
ASTLEY
v.
WELDON.

for certain damages, the jury ought to have been directed to find damages to the amount of the whole ſum ſo agreed for; and the effect of the caſe muſt have been the ſame as if the Plaintiff had declared in debt for a penal ſum. The juriſdiction of Courts of Equity in relieving on penalties is of very high antiquity. The Legiſlature has now adopted this practice and affords the ſame benefit to Defendants in actions at law: and it has lately been ſettled that it is not matter of election in the Plaintiff to proceed under the ſtatute, but that the directions are compulſory, and muſt be purſued (*a*). The queſtion is then, what is the fair preſumable intention of the parties? I do not quarrel with any of the caſes which have been cited. A man in poſſeſſion of his own eſtate may ſet his own value upon the view, the timber, or other ornaments and conveniences of the eſtate, and if he part with the poſſeſſion, he may part with it on the terms that the tenant ſhall cultivate it in ſuch a particular way, but if he vary from that mode of cultivation then ſo much additional rent ſhall be paid. I remember that the caſe of *Rolſe* v. *Peterſon* was not thought altogether ſatisfactory at the time when it was decided: though I do not feel any objection to the determination. The caſe of *Lowe* v. *Peers* could not be conſidered as any thing but a caſe of ſtipulated damages. There is one caſe in which the ſum agreed for muſt always be conſidered as a penalty; and that is where the payment of a ſmaller ſum is ſecured by a larger. In this caſe it is impoſſible to garble the covenants, and to hold that in one caſe the Plaintiff ſhall recover only for the damages ſuſtained, and in another that he ſhall recover the penalty: the concluding clauſe applies equally to all the covenants. If any thing is to be collected from the form of this declaration, it ſhould ſeem that the Plaintiff meant to ſue only for the damages actually ſuſtained. If he had declared in debt and aſſigned breaches he would have been conſidered as having made his election to proceed under the ſtatute, and by varying the form of the action he ſhall not elude the ſtatute. I rely on the form of the inſtrument and on the ſtatute of *William*. With reſpect to the caſe of *Hardy* v. *Martin*, in which I was concerned, Lord *Manſfield* upon the trial at law inclined to think it a caſe of ſtipulated damages: though I ſee by the printed Report that it was conſidered otherwiſe in the Court of Equity.

Rule diſcharged.

(*a*) See *Roles* v. *Roſewell*, 5 *Term Rep*. 538. and *Hardy* v. *Bern*, 5 *Term Rep*. 636.

WHITBURN *v.* STAINES.

Jan. 27th.

It ſeems the Court will not change the *venue* in an action on an award, even though the declaration contain the common counts. Nor will they oblige the Plaintiff to undertake to give evidence on the count upon the award.

ASSUMPSIT. The firſt count of the declaration was upon an award; which was followed by the common counts.

Bayley Serjt. applied for a rule *niſi* to change the *venue* from *Middleſex* to *Suſſex;* and obſerved, that although in actions on ſome inſtruments the Courts had refuſed to change the *venue*, yet that in the caſe of *Pinkney* v. *Collins*, 1 *Term Rep*. 571. where the Court refuſed to change the *venue* in an action on a bill of exchange, the reaſon given was, that ſuch inſtruments were *bona notabilia* in any county, which does not apply to an award.

Upon this *Chambre* J. read a manuſcript note of a caſe of *Orme* v. *Almay*, *B. R. M.* 26 *Geo*. 3. where the Court refuſed to change the *venue*, the action being on a note to pay 15*l.* if the Defendant did not compleat his contract for an inn purchaſed at an auction, which was not a negotiable note.

Bayley then urged that the Plaintiff ought to be bound to confine his evidence to the count on the award, as in *Maugir* v. *Hinds*, *Barnes* 487. *ed.* 3.; or at leaſt ſhould undertake to give evidence on that count at the peril of a non-ſuit, as in *The Duke of Bedford* v. *Bray*, *Barnes* 491. *ed.* 3.; for unleſs the Court ſhould put Plaintiffs under theſe terms, they would always be at liberty to lay the venue where they pleaſed, by introducing a count upon an inſtrument which never exiſted.

The Court intimated an opinion that the application could not ſucceed but offered to grant a rule *niſi*.

Whereupon *Bayley* deſired to take nothing by his motion.

MANN *v.* SHERIFF.

Jan. 28th.

In an affidavit to hold to bail the Plaintiff depoſed that at the time of the aſſignment thereinafter mentioned, the Defendant was indebted to him on a bill of exchange, and that he afterwards aſſigned the debt by indenture to *A. B. C.* and *D.* in truſt. *A* then depoſed that at the time of the affidavit being made the Defendant was indebted to them *A. B. C.* and *D.* as ſuch truſtees and aſſignees as aforeſaid. Held that the affidavit was inſufficient, becauſe it did not deny that the debt had been ſatisfied to the Plaintiff between the aſſignment and the time of the affidavit being made. But a ſupplemental affidavit was allowed.

THE Defendant in this caſe was held to bail upon an affidavit made by the Plaintiff and one *Robert Geddes*. In that affidavit the Plaintiff depoſed "that at the time of making the aſſignment hereinafter mentioned the Defendant was juſty indebted to him the Plaintiff in the ſum of 37*l.* as the acceptor of a bill of exchange payable to the order of *Thomas Watſon* and duly indorſed to the Plaintiff and that the Plaintiff by a certain indenture bearing date, &c. aſſigned the ſaid debt among divers other debts and effects to the other deponent *Robert Geddes* together with *J. L.*, *J. C.*, *W. M.*, and *J. H.* in truſt for the benefit of the creditors of the ſaid Plaintiff." *Robert Geddes* then depoſed "that the Defendant is juſtly and truly indebted to him and the ſaid *J. L.*, *J. C.*, *W. M.*, and *J. H.* as ſuch aſſignees and truſtees as aforeſaid in the ſaid ſum of 37*l.* upon and by virtue of the ſaid bill of exchange and the ſaid aſſignment." Laſtly, the Plaintiff and *Geddes* depoſed "for themſelves and each of them that no tender of the ſaid ſum of money or any part thereof hath been made in any note or notes of the Governor and Company of the Bank of *England* expreſſed to be payable on demand."

A rule *niſi* having been obtained for diſcharging the Defendant upon a common appearance;

Vaughan, Serjt. in ſupport of the rule contended, that it ought to appear by the affidavit that the Defendant was indebted to the Plaintiff on record at the time of the affidavit made; whereas in this caſe it only appeared that the Defendant was indebted to him at the time of the aſſignment.

Bayley, Serjt. *contrà* inſiſted that in caſes like the preſent, it was quite ſufficient if the aſſignees who have the equitable intereſt ſwear that the Defendant is indebted to them as ſuch aſſignees at the time of the affidavit made: he cited *Creſwell* v. *Lovell*, 8 *Term Rep.* 418.

Lord Eldon, Ch. J. ſaid, The caſe of *Creſwell* v. *Lovell*, as far as it affects that now before the Court, ſeems to have been founded upon the authority of ſome caſes of legal aſſignees; which caſes do not appear to me to bear any analogy to it; for neither in *Creſwell* v. *Lovell*, nor in this caſe, could the action be brought in the name of the aſſignees. Though the Plaintiff in the preſent inſtance ſwears that the Defendant was indebted to him at the time of the aſſignment, yet ſubſequent to that time the Plaintiff may have received the money and given a diſcharge; and conſequently, it is poſſible conſiſtently with the Plaintiff's affidavit that nothing may have been due at the time of the affidavit made. If however the Plaintiff had added that ſubſequent to the aſſignment nothing had been paid to him, the affidavit would have been ſufficient.

Bayley then applied for leave to file a ſupplemental affidavit in order to make that addition (*a*); which after ſome oppoſition was granted.

(*a*) Vide *Garnham* v. *Hammond, ante*, 298.

TIPPING *v.* JOHNSON.

Jan. 28th.

Plaintiff may ſue out execution by a different attorney from the attorney in the cauſe, without obtaining an order of Court for changing the attorney.

A RULE having been obtained by *Bayley* Serjt. calling on the Plaintiff to ſhew cauſe why the execution ſued out in this caſe ſhould not be ſet aſide for irregularity, 1ſt, Becauſe it had been ſued out after ſervice of the allowance of a writ of error; 2dly, Becauſe it was ſued out by an attorney different from the one who had been attorney in the cauſe, and no order for changing the attorney had been obtained (*a*);

Shepherd, Serjt. as to the firſt point produced an affidavit ſtating a declaration of the Defendant, that the writ of error was ſued out for delay; and was proceeding to argue on the ſecond point,

When HEATH, J. ſaid, that it appeared by ſeveral caſes collected in *Rol. Abr.* (*b*) that the authority of an attorney determines with the judgment and therefore no order to change the attorney was neceſſary.

Per Curiam, Rule diſcharged with coſts.

(*a*) See *Reg. Gen.* A.D. 1654. *B. R. ſ.* 10. *C. B. ſ.* 13. *Kaye* v. *De Mattos*, 2 *Bl.* 1323. and *Macpherſon* v. *Roriſon*, *Doug.* 217.

(*b*) Vol. 1. fol. 291. *M.* But the attorney in the ſuit may ſue out execution within a year after the judgment without a new warrant 2 *Inſt* 378.; or ſue out a *ſcire facias* againſt bail, and pray an *alias*. *Burr* v. *Atwood*, 1 *Salk.* 89; though when the *ſcire facias* is returned there muſt be a new warrant. *ibid.* Indeed the reaſon given by *Holt*, Ch. J. why he may ſue out the *ſcire facias* is, that any one might ſue out or pray the *ſcire facias*, and therefore the old attorney might. It is alſo laid down, that the attorney after judgment may acknowledge ſatisfaction on the record, upon receiving the money, 1 *Rol. Rep.* 366; or even without having received the money, *Per Dodderidge* and the clerks, though *Coke* thought otherwiſe, 1 *Rol. Rep.* 367. In 1 *Rol. Abr.* 291. *l.* 10. it is ſaid that the attorney after judgment cannot releaſe damages; but in *Lamb* v. *Williams*, 1 *Salk.* 89. it was determined that he might.

1801.

Feb. 4th.

KERR *v.* SHERIFF.

If the writ be that the Defendant anſwer "in a certain plea of treſpaſs on the caſe on promiſes" and the declaration be in debt "for goods ſold and delivered and money borrowed" the Court will diſcharge the Defendant on entering a common appearance.

A RULE *niſi* was obtained in this caſe for entering a common appearance and having the bail-bond delivered up to be cancelled, on the ground of a variance between the writ and the declaration; the *ac etiam* clauſe of the *capias* being, that the Defendant ſhould anſwer "in a certain plea of treſpaſs on the caſe on promiſes to the damage of the Plaintiff, &c." and the declaration being debt for goods ſold and delivered and money borrowed.

Shepherd, Serjt. now ſhewed cauſe, and contended that the Court would look to the affidavit to hold to bail, to ſee whether the ſame cauſe of action had been purſued in the declaration as that for which the Defendant had been arreſted, and that the affidavit in this caſe being "for money lent and advanced" the ſame cauſe of action had been purſued; he admitted that if the affidavit be for trover and the declaration on promiſes the Court will diſcharge the Defendant on common bail, under 13 *Car.* 2. *ſt.* 2. *c.* 2. as was done in *Tetherington* v. *Golding*, 7 *Term Rep.* 80; and that on the ſame ground proceeded the caſes of *De la Cour* v. *Read*, 2 *H. Bl.* 278. and *Spalding* v. *Mure*, 6 *Term Rep.* 363, whereas the only queſtion in this caſe was, whether the Court would diſcharge the Defendant becauſe the declaration was debt on promiſes inſtead of caſe on promiſes.

Vaughan, Serjt. *contrà* obſerved, that the caſe depended on the ſtatute of *Car* 2., and that in *Lockwood* v. *Hill*, 1 *H. Bl.* 310. where the *ac etiam* was caſe on promiſes, and the declaration was in debt, an application to diſcharge the Defendant was only refuſed becauſe the ſum ſworn to was under 40*l.*; in which caſe the *ac etiam* not being neceſſary, the variance was immaterial. He cited a caſe of *Barnes* v. *Trompowſky*, *K. B.* where the *ac etiam* being in covenant, and the affidavit to hold to bail on a foreign charter-party, the Plaintiff having declared in debt on the charter-party the defendant was diſcharged on common bail: and alſo urged that if in theſe caſes the Court did not interfere bail would be made liable for cauſes of action for which they did not mean to bind themſelves.

The Court obſerved, that the condition of the bail-bond expreſſed the cauſe of action, and in ſo doing followed the words of the *ac etiam* clauſe literally, and that therefore if the Plaintiff's declaration varied from his writ, the Defendant could never be ſaid to be condemned in the action mentioned in the condition, ſo as to charge the bail.

Per Curiam, Rule abſolute (*a*).

(*a*) Where a writ is ſued out by Plaintiffs as executors, and a declaration is afterwards delivered in their own right, the Court will diſcharge the Defendant on filing common bail. *Douglas and others* v. *Irlam*, 8 *Term Rep.* 416. So if Plaintiff take out a writ in his own name and declare as executor; or ſue out a writ *quare clauſum fregit*, and declare in trover; *Per Cur.* 5 *Term Rep.* 402. But if the writ be in debt for a ſum certain, and the declaration in debt alſo but for a leſs ſum, the Court will not diſcharge the Defendant. *Turing* v. *Jones*, 5 *Term Rep.* 402.

HAWKINS *v.* ECKLES, WILSON, SMITH, and ROUTH.

Feb. 4th.

In an avowry Defendant averred that all thoſe whoſe eſtate he now has, &c. *from time whereof*, &c. have been accuſtomed to have and of right *during all the time aforeſaid* ought to have had and ſtill of right ought to have common of paſture in the *locus in quo*—Held bad, and that it did not amount to an averment of right of common at all times of the year.

If defendant in replevin plead by way of juſtification of the taking that he was *poſſeſſed* of a meſſuage with common appurtenant, and that the Plaintiff's cattle were damage feaſant on the common, and conclude in bar, without praying a return, it ſeems that ſuch a plea is bad.

REPLEVIN of cattle.

1ſt, The Defendant *Routh* in his own right and the other defendants as his bailiffs acknowledged the taking, becauſe the Defendant *Routh* was ſeiſed in his demeſne as of fee of and in a certain meſſuage with the appurtenances ſituate, &c. "and the ſaid *Routh* and all thoſe whoſe eſtate he now has and at the ſame time when, &c. had, of and in the ſaid meſſuage, &c. with the appurtenances from time whereof, &c. have had and have been uſed and accuſtomed to have and of right during all the time aforeſaid ought to have had, and the ſaid *Rouths* till of right ought to have common of paſture in and throughout the ſaid place in which, &c. called, &c. for two cows or heifers as to the ſaid meſſuage with the appurtenances belonging and appertaining:" they then acknowledged the taking of the cattle as damage feaſant, and prayed a return.

2dly, The Defendant pleaded by way of juſtification "that the ſaid *Routh* before and at the ſaid time when, &c. was *poſſeſſed* of a certain other meſſuage with the appurtenances ſituate, &c. and that the ſaid *Routh* being ſo poſſeſſed thereof before and at the ſaid time when, &c. was lawfully entitled to and of right ought to have had common of paſture in and throughout the ſaid place in which, &c. to depaſture the ſame at the ſaid time when, &c. with two cows or heifers as to the ſaid laſt mentioned meſſuage with the appurtenances belonging and appertaining." They then averred,

averred, that the cattle were damage feaſant, ſo that the ſaid *Routh* could not enjoy his common *tam amplo modo*, and therefore the ſaid *Routh* in his own right and the other Defendants, as ſervants of the ſaid *Routh*, took them and detained them as a diſtreſs for ſuch damage; and concluded by praying judgment *ſi actio*, &c.

3dly, The Defendants alſo pleaded by way of juſtification, that the Defendants *Wilſon* and *Smith* were *poſſeſſed* of the place in which, &c. with the appurtenances, and being ſo poſſeſſed thereof the ſaid two Defendants in their own right, and the other two as their ſervants, took the cattle damage feaſant; concluding as in the ſecond plea.

The Plaintiff demurred ſpecially, and aſſigned for cauſes, "that the ſaid Defendants have not ſhewn in the firſt avowry and cognizance at what time or times and when nor for what period of time the ſaid Defendant *Routh* is entitled to common of paſture in the ſaid place in which, &c. but have only alleged that he has common of paſture in the ſaid place in which, &c. generally without ſpecifying whether he has common every year and at what period of the year or how otherwiſe, ſo that it does not appear that the ſaid Defendant *Routh* at the time of taking the ſaid heifers had any right of common in the ſaid place in which, &c. And alſo for that ſaid Defendants have in their ſaid ſecond avowry and cognizance ſtated that ſaid Defendant *Routh* was poſſeſſed of a certain meſſuage and as ſuch was lawfully entitled to common of paſture in the ſaid place in which &c. which allegation is too general and no certain iſſue can be taken either upon the poſſeſſion of ſaid Defendant *Routh* of the ſaid meſſuage or upon title to common of paſture in the ſaid place in which, &c. And alſo for that it is alleged in the laſt avowry and cognizance that the ſaid Defendants *Wilſon* and *Smith* were poſſeſſed of the ſaid place in which &c. whereas it ought to have been ſtated that ſome perſon was ſeiſed thereof in fee and deduced a title to the ſaid meſſuage from ſuch perſon to the ſaid Defendants *Wilſon* and *Smith*. And alſo for that the ſecond and laſt avowries and cognizances begin and conclude in bar of the action inſtead of averring and acknowledging reſpectively the taking of the ſaid heifers and praying a return of them. And alſo for that all the ſaid avowries and cognizances are defective, uncertain, and want form, &c."

Williams Serjt. in ſupport of the demurrer, after ſtating it to be "a common learning that avowries muſt ſhew a good title in *omnibus*" ſo as to entitle the Defendant to a return, and citing *Gooodman* v. *Ayling*, *Yelv.* 148. *Matthews* v. *Cary*, *Carth.* 74. *Salk.* 107. S. C. and *Butt*'s caſe, 7 *Co.* 23., was proceeding to argue on the pleas,

When *Vaughan* Serjt. was called upon by the Court to ſtate the grounds on which he thought the demurrer might be reſiſted. In reſpect of the avowry he obſerved, that as it was averred that the avowant and all thoſe whoſe eſtate he had, "from time whereof the memory of man was not to the contrary," were accuſtomed to have a right of common, "and during all the time aforeſaid" of right ought to have had it, it amounted to an averment that the avowant was entitled to common at all times of the year, and that if any right more limited than that had been proved at the trial, the avowry could not have been ſupported. As to the pleas, he ſaid, that he meant to contend that they amounted to a ſufficient juſtification of the taking; and that it was not neceſſary in a mere juſtification to ſhew a title in *omnibus* (*a*), as no return is prayed (*b*).

But

(*a*) In treſpaſs it is ſufficient to juſtify under a *poſſeſſion* if the title does not come in queſtion. As in aſſault and battery and *molliter manus* pleaded. *Skevill* v. *Avery*, *Cro. Car.* 138. So in *quare clauſum fregit* Defendant may plead that he was *poſſeſſed* of a cloſe called *A*, and the Plaintiff of a cloſe called *B*., that the latter ought to repair the fences, and that for default thereof Defendant's cattle eſcaped into *B*. *Faldo* v. *Ridge*, *Yelv.* 74. So to treſpaſs for taking cattle, poſſeſſion of the *locus in quo* for a term of years was pleaded, and that the cattle were damage feaſant therein. *Anon.* 2 *Salk* 643. *Searl* v. *Bunion*, 2 *Mod.* 70. *Langford* v. *Webber*, 3 *Mod.* 132. And in *Randle* v. *Dean and Another*, *Lutw.* 1496. which was treſpaſs for beating the Plaintiff's ſervants and horſes, the Defendant pleaded that he was poſſeſſed of the *locus in quo*, and that the ſervants and horſes were damage feaſant. The Reporter indeed obſerves at the end of this laſt caſe, that no exception was taken, that poſſeſſion only was pleaded without ſhewing what eſtate; but had it been taken it ſhould ſeem from the current of authorities that it would not have availed. There is however a caſe in *Moor* 846. *Smith* v. *Bull.* where the Defendant in an action of aſſault and battery having pleaded that he *molliter manus impoſuit* on the Plaintiff who entered into his cloſe, the Court held that the Defendant ſhould have ſhewn what eſtate he had in the cloſe, and that the Plaintiff came to eject or diſſeiſe him, but it is obſervable that there the Defendant did not aver that he was in poſſeſſion, but only that it was *his* cloſe, which might be true, and yet he not in poſſeſſion: independent of which this caſe ſtands contradicted by the authority of *Oſway* v. *Briſtow*, 10 *Mod.* 37. where the Defendant in treſpaſs having juſtified taking the Plaintiff's cattle, becauſe they were damage feaſant *in clauſo ſuo*, it was held good. Indeed the doctrine that poſſeſſion may be pleaded in treſpaſs is confirmed by a late caſe. *Taylor* v. *Eaſtwood*, 1 *Eaſt.* 212; though it was there reſolved, that ſuch a plea might be anſwered by replying title in a third perſon.—But in replevin, where an avowant pleaded generally, that he was ſeiſed of the *locus in quo* without ſaying of what eſtate, and avowed that he took the cattle damage feaſant, and prayed a return, the avowry was held bad. *Saunders* v. *Huſſey*, 2 *Lutw.* 1231. *Carth.* 9. S. C. 1 *Ld. Raym.* 332. S. C. Indeed in *Langford* v. *Webber*, 3 *Mod.* 132. where poſſeſſion was pleaded in juſtification of treſpaſs, it was admitted *arguendo*, that it might have been otherwiſe in replevin; and in *Silly* v. *Dally*, 1 *Ld. Raym.* 331. this preciſe point came before

1801.

HAWKINS *v.* ECKLES and Others.

But *The Court* being clearly of opinion that the avowry was bad offered the Defendants leave to amend, intimating that if they perſiſted in arguing the pleas they muſt do it at their peril, ſince they would not be allowed to amend, if upon argument the Court ſhould hold the pleas to be bad.

On hearing this *Vaughan* conſented to amend on payment of coſts.

before the Court, and a conuſance by the Defendant as bailiff to *J. T.* ſtating that the grandfather of *J. T.* being poſſeſſed of the *locus in quo* leaſed the ſame for years, and deriving a title to the leaſe to *J. T.*, was held bad. In that caſe was cited *Paſhley* v. *Seymour*, 2 *Show.* 484. where an avowry of this kind was held good; but the Court expreſsly denied that caſe to be law; and the deciſion in *Silly* v. *Dally*, is confirmed by *Challoner* v. *Clayton*, 3 *Salk.* 306. *Comb.* 472. S. C. and *Freeman* v. *Jugg*, 3 *Salk.* 307. in which laſt caſe however the Court held that the objection muſt be taken advantage of on demurrer, and cannot prevail in arreſt of judgment. From the above caſes it appears to have been determined that in a juſtification of treſpaſs where the title does not come in queſtion poſſeſſion alone may be pleaded, but in an avowry or conuſance in replevin it cannot. Whether it may be pleaded in replevin where the taking only is juſtified, and no return prayed, does not appear to have been hitherto expreſsly decided.

(*b*) There are many inſtances in which the Defendant in replevin cannot avow, but can only plead a juſtification of the taking, in which caſes he is not to pray a return. See *Gilbert's Replevin*, *c.* 7. *ſ.* 3. *p.* 132. *ed.* 2.

Feb. 5th.

STEEL *v.* ALAN.

If a perſon againſt whom a commiſſion of lunacy has iſſued, be arreſted, the Court of *Common Pleas* has no power to diſcharge him.

MARSHALL Serjt. moved to diſcharge the Defendant out of cuſtody upon a common appearance, on the ground of his being a lunatic, and a commiſſion of lunacy having iſſued againſt him previous to the arreſt.

Lord ELDON Ch. J.—I am afraid that there is no prohibition in the law of *England* from arreſting a lunatic. I have often known the Court of *Chancery* go out of its juriſdiction in order to aſſiſt a lunatic in this reſpect; and order a Maſter to take an account of his debts, conſidering it to be for the benefit of the lunatic that they ſhould be paid, as he would otherwiſe be ſubject to arreſt by all his creditors.

Marſhall took nothing by his motion (*a*).

(*a*) The Court of *King's Bench* rejected ſimilar applications in *Kernot and Another* v. *Norman*, 2 *Term Rep.* 390. and *Nutt* v. *Verney*, 4 *Term Rep.* 121.; in the former of which caſes it appeared by affidavit that the Defendant had become inſane after the arreſt, and in the latter that he was inſane at the time of the arreſt.

Feb. 5th.

HIFFERMAN *v.* LANGELLE.

THE declaration in this caſe, which was a town cauſe, was delivered *de bene eſſe* on the 17th of *November*, indorſed "to plead in ——." On the 19th the Defendant obtained an order for a particular, which was complied with on the 20th, and on the 21ſt judgment was ſigned for want of a plea.

The Court on a motion to ſet aſide the judgment, held that the indorſement on the declaration amounted to a notice to plead according to the rules of the Court, *viz.* in four days; that the time for pleading was not ſuſpended by the order for a bill of particulars; and that although a Plaintiff cannot ſign judgment until the order for a particular has been complied with, yet he may do ſo immediately after having delivered the particular, provided the time for pleading be then elapſed.

Bayley Serjt. for the Plaintiff.

Shepherd Serjt. for the Defendant.

If a declaration be indorſed "to plead in —:" it muſt be underſtood to mean within the number of days allowed by the rules of the Court. An order for a bill of particulars does not ſuſpend the time for pleading; and therefore Plaintiff may ſign judgment immediately after delivering the particular, if the time for pleading be then out.

Feb. 5th.

SINCLAIR *v.* CHARLES PHILLIPE, Monſieur de *France*.

THE Defendant in this caſe was arreſted and holden to bail on the following affidavit. "*T. G. Sinclair* of, &c. maketh oath that *Charles Phillipe* is juſtly and truly indebted unto him this deponent in the ſum of 589 *l.* and upwards for money had and received to and for the uſe and on the account of the ſaid *T. G. S.* and for money by the ſaid *T. G. S.* paid laid out and expended lent and advanced in *England* to and for the uſe and on the account of the ſaid *Charles Phillipe* and for intereſt due thereon and upon an account ſtated in *England*." The Plaintiff then negatived any tender in bank notes.

On a former day *Shepherd* Serjt. obtained a rule *Niſi* for diſcharging the Defendant on a common appearance under the 38 *Geo.* 3.

The Defendant an alien within the terms of the 38 *Geo.* 3. *c.* 50. *ſ.* 9. having entered into an agreement with the Plaintiff in a foreign country, the latter in purſuance of the agreement laid out money in *England*, after which the parties came to an adjuſtment in *England*, and the Defendant acknowledged the debt. The Defendant having been holden to bail for money laid out by the Plaintiff in *England* and on an account ſtated in *England*, diſcloſed the above circumſtances, by affidavit, upon which the Court diſcharged him upon a common appearance.

1801.

Sinclair *v.* Charles Phillipe.

c. 50. *ſ.* 9. (*a*), and produced an affidavit ſtating that the Defendant was an alien abiding in this kingdom and a perſon who quitted his country of *France* by reaſon of the revolution and troubles in *France* in 1789; that in 1791 the Defendant together with his brother *Louis Staniſlaus Xavier* ſince King of *France*, being reſident at *Coblentz* in *Germany*, entered into an agreement with the Plaintiff reſpecting his raiſing men for the ſervice of the King and Princes of *France*, and that he was not indebted to the Plaintiff in any ſum of money whatſoever contracted in the dominions of his Majeſty King *George* the Third, to the beſt of his knowledge and belief, or on any other account, or otherwiſe, or elſewhere than in conſequence of the ſaid agreement made at *Coblentz*, and that he verily believed the Plaintiff's demand aroſe out of the ſaid agreement.

Beſt Serjt. now ſhewed cauſe againſt the rule, and relied on an affidavit of the Plaintiff, which alleged that he had expended in *England*, previous to the Defendant's arrival here, ſeveral ſums of money in purſuance of the above-mentioned contract, and alſo that ſeveral adjuſtments of his demands had taken place in this country, upon which occaſions the Defendant acknowledged himſelf indebted to the Plaintiff in conſiderable ſums. He argued from thence that though the commencement of theſe tranſactions took place out of *England*, yet that as money had been expended and an account had been ſtated in *England*, there was a ſufficient debt to ſupport the arreſt notwithſtanding the 38 *Geo.* 3. He alſo urged, that the affidavit being poſitive with reſpect to the debt ariſing in *England*, it was not competent to the Defendant to controvert that fact, and that if there was any ambiguity on the face of the affidavit the Court would allow the Plaintiff to explain it by a ſupplemental affidavit.

Shepherd and *Runnington* Serjts. in ſupport of the rule were ſtopped by the Court.

(*a*) Which provides "that aliens abiding in this kingdom having quitted their reſpective countries by reaſon of any revolution or troubles in *France* or in countries conquered by the arms of *France* ſhall not be liable to be arreſted, impriſoned or held to bail or to find caution for the forthcoming or paying any debt, nor to be taken in execution on any judgment nor by any caption for or by reaſon of any debt or other cauſe of action contracted or ariſing in any parts beyond the ſeas other than the dominions of his Majeſty while ſuch aliens were not within the ſaid dominions of his Majeſty; and in caſe any ſuch alien ſhall have been or ſhall be arreſted &c. contrary to the intent of this act, ſuch alien ſhall be diſcharged therefrom by order of any of his Majeſty's Courts in *Weſtminſter Hall*, or of the Courts of Seſſion in *Scotland*, or of any Judge of ſuch Courts in vacation time."

Lord ELDON Ch. J. The caſe of this illuſtrious perſon muſt be decided on the ſame grounds that would operate in favour of the meaneſt individual falling within the purview of the 38 *Geo.* 3. Whether under the circumſtances ſtated to the Court he does fall within the deſcription of perſons entitled to be relieved by that act, is the queſtion for us to decide? It appears to me that he is entitled to be diſcharged, firſt, becauſe the affidavit under which he has been holden to bail is not ſufficiently diſtinct to meet that caſe in which the act prohibits the arreſt of an alien abiding in this kingdom having quitted his country by reaſon of the troubles in *France.* It would have been very eaſy for the Plaintiff to have ſtated, that the Defendant was indebted to him in a certain ſum of money for a debt not contracted or ariſing in parts beyond the ſeas; but this affidavit may be equally true whether the debt were contracted or aroſe within or without the kingdom. For though the money is ſaid to have been paid in *England*, yet the contract being in *Germany* the debt in the eye of the law ariſes there, and is not altered by the locality of the expenditure. Had no other affidavit therefore been produced to the Court on the part of the Plaintiff, I ſhould be of opinion that in a caſe where the original affidavit is ſo guardedly ſworn, no ſupplemental affidavit ought to be allowed. But taking the affidavit now produced by the Plaintiff as a ſupplemental affidavit, it does not appear to me to ſtate ſufficient grounds for holding the Defendant to bail, for notwithſtanding the tranſactions and adjuſtments ſubſequent to the original contract the debt ſtill remains a debt within the meaning of the ſtatute. Theſe adjuſtments amount to nothing more than an endeavour to provide for the original debt, and if the Court were to hold that every acknowledgment of ſuch a debt created a new demand it would be the means of preventing theſe perſons to whom the act extends from furniſhing to their creditors any vouchers againſt that period when they ſhould be enabled to pay, or having any the moſt honourable and well-intentioned communication with them. It has been ſaid, that it is not competent to the Defendant to controvert the affidavit to hold to bail; but had there been more doubt than there is upon the queſtion of law I am inclined to think that the Defendant's affidavit ought to have been admitted; for where the right to be diſcharged depends upon a queſtion of law it would be very harſh to ſay, that becauſe the Plaintiff has undertaken to ſwear poſitively to a point the truth of which muſt depend on an accurate legal inveſtigation, the Defendant muſt therefore lie in gaol.

Heath J. It appears that this affidavit was drawn with a view to the Act of Parliament; but it does not ſtate a caſe exempt from the proviſions of the act. It does not ſpeak of any contract in *England*, but merely of money paid and laid out in this country, whereas it is the original contract which the act contemplates. There are two periods to be conſidered; the 1ſt, before this Defendant came to *England*, the 2d, ſince his reſidence here. During the 1ſt there is no pretence to ſay that the Defendant was not within the operation of the act, the contract having been made abroad. With reſpect to the 2d it is ſaid that the adjuſtments and ſettlements which have ſince taken place are to be conſidered as equivalent to new promiſes and new debts; but if that were ſo, the conſequences of the act would be very fatal to honourable men. For what honourable man being aſked whether he owed a debt contracted abroad would not immediately acknowledge it, or being deſired to adjuſt it, would refuſe ſo to do? The property of perſons in the Defendant's ſituation may be reſorted to, and if the evidence they themſelves afforded ſo as to affect that property were to affect their perſons alſo, and deprive them of the protection afforded by Parliament, the intention of the Legiſlature would be compleatly defeated.

Rooke J.—I am of the ſame opinion, and ſhould not add any thing to what has been ſaid by my Lord and my Brother *Heath*, if I did not think it neceſſary to declare my opinion that it would be of very dangerous conſequence to hold, that an honourable acknowledgment made in *England* of a debt contracted abroad would charge the perſon of the Defendant, when his perſon would not be chargeable by reaſon of the contract itſelf.

Chambre J.—I am clearly of opinion that the act intended to refer to the original contract. It has been argued that the account ſtated in *England* amounts to a new cauſe of action; but unleſs we conſider the act as looking to the original tranſaction, the protection which it holds out would be merely deluſive. A Plaintiff may proceed to judgment againſt the property of a perſon within the potection of the act; now a judgment is technically ſpeaking a new cauſe of action; but it would be abſurd to hold that the ſame act which meant to prevent the impriſonment of a particular claſs of perſons for particular debts, meant alſo to permit a new cauſe of action to be raiſed againſt them by a judgment againſt their property, which cauſe of action ſhould lead to the impriſonment of their perſons.

Rule abſolute.

SINCLAIR *v.* CHARLES PHILLIPE.

DAVIES and Others, Aſſignees of SHIVERS a Bankrupt, *v.* CHIPPENDALE.

Feb. 9th.

If a priſoner be prevented from juſtifying bail by the Plaintiff's deſiring further time to enquire into their ſufficiency, he is from the time of his notice of juſtification intitled to a demand of a plea before judgment can be ſigned againſt him.

THIS was a rule *niſi* for ſetting aſide an interlocutory judgment ſigned under the following circumſtances. The Defendant (*Vid. ante*, p. 282.) having been continued in cuſtody under a detainer for 1,300 *l.* a declaration was delivered on the 8th of *November* laſt; ſpecial bail was put in to the action in the country on the 24th of the ſame month, and on the ſame day notice ſerved that the bail would juſtify by affidavit on the 28th; the juſtification was oppoſed on the ground of the Plaintiff's not having had time to inquire into the ſufficiency of the bail, but a rule was obtained for a juſtification before a judge at chambers; on the 2d of *December* notice was ſerved of the Defendant's intention to juſtify bail on the 4th of the ſame month, on which day they did juſtify without any oppoſition; but on the 3d of *December* the Plaintiff had ſigned judgment for want of a plea, though no plea had ever been demanded.

Bayley Serjt. ſhewed cauſe and contended that the Defendant being in cuſtody till his bail were actually juſtified, no demand of a plea was neceſſary, inaſmuch as a priſoner is bound to plead without any demand of a plea (*a*), and that in this caſe the judgment being ſigned on the 3d of *December*, when his bail had not juſtified, was a judgment regularly ſigned as againſt a priſoner.

Beſt, Serjt. *contrà*, inſiſted that as the Defendant was only prevented from juſtifying his bail on the 28th of *November* by the Plaintiff's deſiring further time to inquire after the bail, the former muſt be conſidered from the 28th as a perſon entitled to a demand of a plea before judgment could be ſigned againſt him.

The Court expreſſed themſelves clearly of this opinion.

Rule abſolute.

(*a*) If he be in the cuſtody of the ſheriff; *ſecus* if in the cuſtody of the marſhal. *Roſe* v. *Chriſtfield*, 1 *Term Rep.* 591. But even in the latter caſe no demand of a plea is neceſſary if the priſoner has been removed out of the cuſtody of the ſheriff without notice to the Plaintiff. *Wilkinſon* v. *Brown*, 6 *Term Rep.* 524.

Feb. 9th.

VOLLUM *v.* SIMPSON.

If Plaintiff in replevin plead ſeveral pleas in bar upon which iſſues are joined, and ſome iſſues are found for the Plaintiff and ſome for the Defendant, the latter is intitled to ſuch coſts of the trial as relate to the iſſues on which he has ſucceeded as well as to the coſts of the pleadings.

THIS was an action of replevin; in which the Defendant made two cognizances. To each of the cognizances the Plaintiff pleaded three pleas in bar, whereupon ſix iſſues were joined. At the trial a verdict was found for the Plaintiff on the 1ſt, 3d, and 6th iſſues, and for the Defendant upon the 2d, 4th, and 5th. In taxing coſts the Prothonotary allowed to the Plaintiff the coſts of ſo much of the pleadings, briefs, and witneſſes as related to the iſſues upon which he had ſucceeded, amounting to 125 *l.* 15 *s*, and to the Defendant, in the ſame manner, the coſts of ſo much of the pleadings, briefs, and witneſſes as related to thoſe iſſues upon which he had ſucceeded, amounting to 127 *l.* 3 *s.*

The Prothonotary having reported to this effect;

Heywood Serjt. now moved that he might be ordered to review his taxation, arguing thus—Although the Plaintiff, according to the rule lately laid down by the Court (*a*), may not be entitled to the coſts of the iſſues on which he has failed, yet the Defendant can only be entitled to the coſts of the pleadings on thoſe iſſues, not to any coſts of the trial. The Stat. 4 *Ann. c.* 16. after enacting in *ſ.* 4. that any Defendant or Tenant in any action, or ſuit, or any Plaintiff in replevin may plead ſeveral matters, provides in *ſ.* 5. "that if any ſuch matter upon demurrer joined, be judged inſufficient, coſts ſhall be given at the diſcretion of the Court; or if a verdict ſhall be found upon any iſſue in the ſaid cauſe for the Plaintiff or Demandant, coſts ſhall be alſo given in like manner, unleſs the Judge who tried the ſaid iſſue ſhall certify that the Defendant, or Tenant, or Plaintiff in replevin, had a probable cauſe to plead ſuch matter which upon the ſaid iſſue ſhall be found againſt him." In caſe of a verdict therefore coſts are to be allowed in like manner as upon demurrer; but on demurrer there can be no coſts but of the pleadings. Nothing but the coſts of the pleadings appear to have been allowed in *Dodd* v. *Joddrell*, 2 *Term Rep.* 235. and in the caſe of *Page* v. *Creed*, 3 *Term Rep.* 391. it was expreſsly ſaid by the Court, that "the Statute 4 & 5 *Ann.* only gives the coſts of thoſe pleadings;" and that it was not intended thereby to repeal the ſtatute of the 22d and 23d of *Car.* 2. *c.* 9. which enacts that if the Plaintiff recover under 40 *s.*

(*a*) Vid. *Penſon* v. *Lee*, *ante*, 330.

in aſſault and battery, he ſhall recover no more coſts than damages: now if a Defendant in ſuch an action plead ſeveral matters and the Plaintiff be entitled to all the coſts of trial relating to thoſe iſſues on which he ſucceeds though he recovers 1*s*. damages only, the whole effect of the Statute of *Car*. 2. will be defeated. The only caſe to ſupport the preſent taxation in the Defendant's favour is that of *Brooke* v. *Willett*, 2 *H. Bl.* 435; But in that caſe the only authorities cited in the Defendant's favour and on which the judgment may be ſuppoſed to have proceeded were *Butcher* v. *Green*, *Dougl.* 678. and *Dodd* v. *Joddrell;* the former of which caſes was inapplicable to the point in conteſt, and the latter is ſubject to the explanation above ſtated.

Cockell Serjt. *contrà* relied on *Brooke* v. *Willett*.

Lord ELDON Ch. J.—We are informed by the Prothonotary, that it has been the invariable practice of the Court to tax the coſts in the manner which is now contended to be incorrect. The very point now in diſpute came directly before this Court in 1795, in the caſe of *Brooke* v. *Willett*, at which time this Court, after having made inquiry of the Judges of the Court of *King's Bench*, held that the practice which had prevailed was conſiſtent with the true conſtruction of the act. It is ſufficient for me to add, that on looking into the ſtatute the practical conſtruction appears to me to be conſiſtent with the words uſed in the act. Indeed if I had doubts upon the ſubject, I think my doubts ought to be controlled by the uniform practice of the Court.

HEATH J.—The ſtatute of *Anne* being a remedial ſtatute ought to be ſo conſtrued as to advance the remedy. The coſts intended to be given appear to me to be all thoſe coſts which follow the unneceſſary plea. This conſtruction is analogous to that which has been put upon the ſtatute of *Glouceſter*, by which the coſts of the writ only are given to the Plaintiff if he ſucceed, and yet that ſtatute has always been held to give all the coſts of the ſuit.

ROOKE and CHAMBRE Juſtices concurring,

The Prothonotary's Report was confirmed.

1801.

Feb. 10th.

Meagher *v.* Vandyck.

A writ of error operates as a *superſedeas* from the time of the allowance, though it be not ſerved till after execution.

The Defendant in this caſe having ſued out a writ of error, obtained an allowance thereof at 12 o'clock at noon on the 28th of *January*, but did not ſerve the allowance on the Plaintiff before half paſt ſix on the ſame day; in the mean time the Plaintiff ſued out a *ſcire facias* and levied on the Defendant's goods. A rule *Niſi* having been obtained to have this execution ſet aſide and the goods reſtored to the Defendant,

Clayton Serjt. ſhewed cauſe and contended, that although the allowance of the writ of error might amount to a *ſuperſedeas* where the *fi. fa.* has not been executed, yet that if execution has taken place before the ſervice, the allowance will not have the effect of avoiding the execution, and thereby making the ſheriff a treſpaſſer. He mentioned *Incledon* v. *Clarke*, *Barnes* 212. to ſhew that though under a *ca. ſa.* the perſon ſhall be diſcharged, yet in the caſe of a *fi. fa.* the proceedings ſo far as the ſheriff hath gone muſt ſtand.

Beſt Serjt. in ſupport of the rule, inſiſted that the allowance is a *ſuperſedeas* of all proceedings on the judgment, and that the ſervice has no other effect than to bring the party into contempt; *Jaques* v. *Nixon*, 1 *Term Rep.* 279 *Lane* v. *Bacchus*, 2 *Term Rep.* 44 and *Meriton* v. *Stephens*, *Barnes*, 205.

The Court at firſt inclined to think that as the execution had taken place before notice of the allowance it would be going too far to hold the ſheriff a treſpaſſer, but took time to conſider of their opinion.

On this day Lord Eldon Ch. J. ſaid—Upon looking into the authorities and conſidering this queſtion, we are fully ſatisfied that the writ of error muſt be deemed a *ſuperſedeas* from the time of the allowance (*a*), and that the execution of the *fi. fa.* was therefore irregular.

Rule abſolute.

(*a*) Vid. *Gravall* v. *Stimpſon*, *ante*, vol. 1. p. 478.

AUBERT *v.* MAZE

Feb. 11th.

Money paid by one of two partners for the other on account of loſſes incurred by them on partnerſhip inſurances, cannot be recovered in an action brought by him againſt the other partner. And if this with other cauſes of diſpute between the two be referred to an arbitrator who awards a ſum due from one to the other for money ſo paid, the Court will ſet aſide that part of the award.

A VERDICT in this caſe having been taken for the Plaintiff by conſent, ſubject to the award of an arbitrator, and the order of reference made a rule of Court, the arbitrator found that the Plaintiff was indebted to the Defendant in 95*l.* 14*s.* 9*d.* on the balance of an account between them for money lent, advanced, and paid by the latter, and awarded that ſum to the Defendant. He then proceeded as follows: "And I alſo find and determine that the ſaid Plaintiff is further indebted to the ſaid Defendant in the ſum of 680*l.* 2*s.* being one moiety of divers ſums of money paid by the Defendant for and on account of loſſes on policies of inſurance underwritten by agreement between the ſaid Plaintiff and the ſaid Defendant at their joint riſk and for their joint benefit," and accordingly awarded that ſum to the Defendant.

A rule *Niſi* having been obtained on a former day for ſetting aſide this award;

Cockell and *Vaughan* Serjts. now ſhewed cauſe. The arbitrator has ſtated upon the face of the award the circumſtances under which the 680*l.* 2*s.* has become due for the purpoſe of taking the opinion of the Court, whether the Defendant be entitled to recover the money ſo paid on account of an illegal partnerſhip. Although it be illegal for underwriters to enter into partnerſhip, yet they are liable to the inſured for the amount of the ſums underwritten, ſince it is not competent to them to ſet up the illegality of their own conduct by way of defence (*a*) and therefore as the Defendant has only paid on behalf of the Plaintiff what the Plaintiff himſelf would have been bound to pay, the former is entitled to recover the amount as money paid to the uſe of the latter. In *Faikney* v. *Reynous*, 4 *Burr.* 2069, it was held that the Plaintiff was entitled to recover upon a bond given to ſecure the repayment of money advanced by him to ſettle ſtock-jobbing differences, on the ground of the advancement of the money being collateral to the illegal concern. In *Petrie* v. *Hannay*, 3 *Term Rep.* 418. Mr. Juſtice *Buller* obſerves, "there is a wide difference between partners engaged in legal and illegal contracts; in the former if one of the partners pay the whole of a partnerſhip debt without any expreſs promiſe from the

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(*a*) *Sullivan* v. *Greaves*, *Park. Inſur.* 8.

the other, the law gives him a right to recover it back in an action for money paid to the uſe of that other partner, and it proceeds on this ground, that both are liable to pay: but in the caſe of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action againſt the other by paying the whole without his conſent; in ſuch caſes it is neceſſary to have the conſent and direction of that other." Now in this caſe both parties being compellable to pay the money, either of them had a right to advance the whole, and to call upon the other to repay a moiety, upon the ſame principle that a partner in a legal partnerſhip may do the ſame, namely that the payment is not voluntary. In *Watts* v. *Brook*, 3 *Veſ.* jun. 312. the Maſter having been directed to take an account in a partnerſhip concern, and having included money advanced on tranſactions ſimilar to the preſent, exceptions were taken to that account, but the Lord Chancellor ordered it to ſtand.

Shepherd, *Lens*, and *Bayley* Serjts. *contrà*. If one partner in an illegal concern, make a payment for the other at his expreſs deſire, ſuch a payment may be conſidered as made for the uſe of the latter: but if a moiety of the money paid by one partner in the courſe of an illegal concern, without ſuch expreſs deſire, may be recovered as money paid to the uſe of the other, the ſtatutes prohibiting illegal partnerſhips are altogether nugatory. The caſes of *Faikney* v. *Reynous* and *Petrie* v. *Hannay* have been conſiderably impeached by *Steers* v. *Laſhley*, 6 *Term Rep.* 61. and *Mitchell* v. *Cockburne*, 2 *H. Bl.* 379. At any rate this caſe does not fall within the principle of *Faikney* v. *Reynous* and *Petrie* and *Hannay*, of which *Eyre* Ch. J. in *Mitchell* v. *Cockburne* obſerves, that they were one ſtep removed from the illegal contract itſelf and did not ariſe immediately out of it: and indeed his Lordſhip adds, that perhaps it would have been better if thoſe caſes had been decided otherwiſe, for when the principle of a caſe is doubtful he thought it better to overrule it at once than build upon it at all. The caſes of *Sullivan* v. *Greaves*, *Park. Inſur.* 8. and *Booth* v. *Hodgſon*, 6 *Term Rep.* 405. are ſtrong authorities to ſhew that money paid or received on account of partnerſhip inſurances cannot be recovered.

Lord ELDON Ch. J.—This caſe coming before the Court on a point expreſsly reſerved for their opinion by the arbitrator, we are not called upon to unravel the facts on which he has come to a determination either one way or the other, but to form a determination on the facts ſubmitted to our judgment. Some of the caſes on this ſubject, eſpecially that of *Petrie* v. *Hannay*, have proceeded on a diſtinction the ſoundneſs of which I very much doubt. It has been ſaid, that if one partner in an illegal partnerſhip concern pay money for the other without his authority, that money cannot be recovered; but if the money be paid with his authority it may be recovered. It ſeems to me however, that if two perſons engage in partnerſhip in an illegal concern, each of them gives an authority to the other to tranſact all that buſineſs relating to the partnerſhip without tranſacting which no profit can ever ariſe from the concern. In *Sullivan* v. *Greaves*, a third perſon undertook to bear half the Plaintiff's riſk in an inſurance; the Plaintiff therefore underwrote for the joint uſe of both, and the agreement amounted to an implied authority to the Plaintiff in caſe of a loſs to pay the whole. Indeed if it were otherwiſe, the partnerſhip muſt have been put an end to the moment occaſion aroſe for the firſt tranſaction in it. The conſequence therefore ſeems to be this, that if a partnerſhip be legal the law raiſes an implied conſent, and if it be illegal, yet if the payment be made in the courſe of the partnerſhip buſineſs, a jury will be warranted in finding an implied conſent to that payment without which the partnerſhip could not ſubſiſt an inſtant. Lord *Kenyon* does not appear to have taken any diſtinction between an expreſs and an implied promiſe in *Sullivan* v. *Greaves*; his words are "here the Plaintiff is himſelf the underwriter who comes to enforce an illegal contract; it is a partnerſhip *pro hâc vice* and this party cannot apply to a court of juſtice to enforce a contract founded in a breach of the law." So in *Mitchell* v. *Cockburne*, Lord Chief Juſtice *Eyre* ſpeaking of this ſort of partnerſhip, ſays "no contract can ariſe directly out of ſuch a proceeding ſo as to be the foundation of an action" His Lordſhip reaſons on the caſes of *Faikney* v. *Reynous* and *Petrie* v. *Hannay*, obſerving that "they were one ſtep removed from the illegal contract itſelf, and did not ariſe immediately out of it" and adds "perhaps it would have been better if they had been decided otherwiſe." Indeed it ſeems to me that if the principle of thoſe caſes is to be ſupported, the Act of Parliament will be of very little uſe. My Brother *Heath* in that caſe agreed with the Lord Chief Juſtice; and I do not underſtand him to have ſaid more of *Petrie* v. *Hannay*, than, that if right it proceeded upon a principle not applicable to the caſe before him: not that the principle itſelf was right. In *Booth* v. *Hodgſon* which was another caſe of an inſurance partnerſhip, one of the partners and a ſtranger acted as brokers,

1801.
AUBERT
v.
MAZE.

brokers, and having received the premiums were ſued by the other partners for their ſhares. Now there, it might have been inſiſted, that the premiums being received by the conſent of the other partners, the parties receiving were liable to account for them; but the Court held otherwiſe. In addition to this, the caſes of *Steers* v. *Laſhley* and *Brown* v. *Turner*, 7 *Term Rep.* 630. ſtand in oppoſition to *Petrie* v. *Hannay*, *Faikney* v. *Reynous*, and *Watts* v. *Brook*. With reſpect to *Petrie* v. *Hannay* very great weight is due to the opinion of Lord *Kenyon*, who diſſented from the reſt of the Court. It is unneceſſary to give a decided opinion on the determination in *Faikney* v. *Reynous*, ſince the circumſtance of a ſpecialty given to ſecure the money advanced, and which was there conſidered as amounting to a new contract, does not exiſt in this caſe. And as to the caſe in *Chancery* it may be obſerved, that it is poſſible that where parties have ſettled the balance of a mixed account between them of long ſtanding, and one party has had an advantage for many years of credit being given to him for certain ſums therein, a Court of Equity may feel itſelf called upon in juſtice to open the whole account, if the party who has already had credit for thoſe ſums think proper to object to an account being taken of the reſidue. But if that is to be conſidered as a caſe in which it was dryly decided that if a Maſter in the courſe of taking an account find certain ſums paid on account of any of theſe illegal tranſactions he may, on the ground of conſent to ſuch payment, view them in the ſame light as the other *items* of the account, it does not appear to me that the caſe proceeds upon a principle ſufficiently conſiſtent with the Act of Parliament to juſtify the adoption of it.

HEATH J.—I am of the ſame opinion as my Lord, who has ſo fully gone through the caſes, that I ſhall only hint at them. I take it to be by no means ſettled that if one partner in an illegal concern pay money for the other with his conſent, the money ſo paid can be recovered. There are great authorities and opinions both ways, and we are therefore at liberty to decide upon principles. If the concern in which the money is advanced be *malum in ſe*, it will not be diſputed that it cannot be recovered. For if two agree to aſſaſſinate a perſon and hire a third to do it, and one of the two former pay the whole reward, it is clear that he cannot maintain an action for a moiety. Now I do not ſee any ſound diſtinction between the caſe of money paid in a concern which is *malum in ſe* and money paid in a concern which is *malum*

prohibitum.

prohibitum. The latter as well as the former tends to encourage a breach of the law. With reſpect to what was ſaid by me in *Mitchell* v. *Cockburne*, though I obſerved, that it was diſtinguiſhable from the caſes in *Burrow* and in the *Term Reports*, it is not a fair inference that I meant to approve of the latter caſes. Many Judges have avoided giving extrajudicial opinions, and had I given an expreſs opinion on thoſe caſes it would have been extrajudicial.

ROOKE J.—I perfectly agree with my Brother *Heath* in reprobating any diſtinction between *malum prohibitum and malum in ſe*, and conſider it as pregnant with miſchief. Every moral man is as much bound to obey the civil law of the land as the law of nature. With reſpect to this tranſaction, I do not mean to give any opinion how far the Court would have been called upon to ſet aſide this award upon an affidavit ſtating the ſpecial circumſtances, had nothing appeared upon the face of the award itſelf. But in this caſe the arbitrator has ſtated all the circumſtances of the caſe ſpecially for our opinion. Then the queſtion is, Whether as the arbitrator has aſked for our opinion, we are not bound by the authority of *Mitchell* v. *Cockburne* to ſay that the latter part of the award muſt be ſet aſide? I think we are.

CHAMBRE J.—I have no doubt upon the caſe. The queſtion for us to decide is not, whether we ſhall open tranſactions cloſed by a general award which is apparently good; ſince the whole caſe ariſes on inſpection of the award itſelf, and is therefore in the nature of a caſe reſerved for ſpecial verdict. There is no doubt that an arbitrator is bound by the rules of law like every other Judge, and if it appear on the face of the award that the arbitrator has acted contrary to law, his award muſt be ſet aſide. In this caſe the Plaintiff wants to avail himſelf of an agreement entered into contrary to law, and calls upon us to enforce that agreement. To ſhew that it is contrary to law *Booth* v. *Hodgſon* is a very ſtrong authority. In that caſe the Court refuſed to aſſiſt a partner in an illegal concern in recovering money paid to his partner in the courſe of the concern, and which he was unconſcientiouſly endeavouring to keep in his own pocket. The caſes of *Faikney* v. *Reynous* and *Petrie* v. *Hannay* were there very much doubted. I think we cannot do otherwiſe in this caſe than decide the queſtion ſubmitted to us according to law, and therefore that ſo much of the award as is founded on this illegal partnerſhip muſt be ſet aſide.

Accordingly *The Court* ſet aſide the latter part of the award.

1801.

Feb. 11th.

Da Costa *v.* Clarke.

If an Avowant in replevin after trial and verdict for the Plaintiff obtain judgment *non obſtante veredicto* in conſequence of the Plaintiff's pleas in bar being bad, he is not entitled to any coſts upon the pleadings ſubſequent to the pleas in bar, becauſe he ſhould have demurred to to them.

THE Prothonotary in this caſe (*ante*, p. 257.) not having allowed to the avowant any coſts upon the pleadings ſubſequent to the pleas in bar, nor any coſts of the trial, *Marſhall* Serjt. obtained a rule to ſhew cauſe why he ſhould not be directed to review his taxation, and allow to the avowant the coſts upon all the pleadings;

Shepherd and *Bayley* Serjts. now ſhewed cauſe, and contended that the ſtatute of 21 *H.* 8. *c.* 19. *ſ.* 3. which gives coſts to an avowant, does not contain any expreſſions to prevent the Court from regulating the coſts to be allowed according to the general rules which have prevailed reſpecting coſts in other caſes; that as all the pleadings ſubſequent to the pleas in bar had been occaſioned by the default of the avowant, who might have obtained judgment at that ſtage of the cauſe by demurring, it was not juſt that he ſhould receive the coſts of thoſe pleadings; that the caſe of a repleader was very analogous to the preſent, in which caſe no coſts are allowed to either party upon the pleadings ſubſequent to the point at which the fault is made; and that the caſe of *Kirk* v. *Nowill*, 1 *Term Rep.* 266. was in point, where the Defendant in treſpaſs having pleaded ſeveral pleas on which iſſues were joined, a verdict was given for the Plaintiff on all the iſſues but one, and for the Defendant upon that one; but the plea on which the Defendant ſucceeded being ſhewn to be bad, and the Plaintiff obtaining judgment *non obſtante veredicto*, the Court of King's Bench held that the Plaintiff was not entitled to any coſts of the iſſue on the Defendant's bad plea (*a*).

Marſhall Serjt. in ſupport of the rule admitted that the avowant was not entitled to the coſts of the trial, but contended that as he had judgment on the whole record, he ought to have the coſts of all the pleadings; that the ſtatute of 21 *H.* 8. expreſsly directed that if the avowry, cognizance, or juſtification be found for the avowant, or the Plaintiff be nonſuit or *otherwiſe barred*, he ſhall recover his damages and coſts in the ſame manner as the Plaintiff would have done if he had recovered; that it might often be adviſeable

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(*a*) *Bayley* Serjt. was about to contend that the Plaintiff was entitled to the coſts of the iſſue on *non cepit* under the ſtat. 4 *Ann. c.* 16. but as that point could not be brought under diſcuſſion by the preſent rule, nothing was ſaid on that head.

1801.
Da Costa
v.
Clarke.

viſeable for an avowant to take iſſue and proceed to trial rather than demur to a doubtful plea; and that if he failed by any accident at the trial, and afterwards ſucceeded by reſorting to any fault in the pleadings, he ought not to be prevented from recovering thoſe coſts to which the juſtice of the whole caſe entitled him. He obſerved that the caſe of *Kirk* v. *Nowill* differed materially from the preſent, inaſmuch as the Plaintiff in treſpaſs is only entitled by the words of the ſtatute of *Glouceſter* to the coſts of his writ, and whatever more he receives proceeds from the equitable conſtruction put upon that ſtatute by the Court; beſides, as the opinion of *Buller* J. in that caſe was founded on the ſuppoſition that other caſes had been decided againſt the Plaintiff, and no ſuch caſes are to be found, the authority of that opinion is leſs to be relied on; whereas the caſe of *Broadbent* v. *Wilks*, *Barnes*, 266. is directly contrary to *Kirk* v. *Nowill.* He added, that at all events the Court would rather abide by the deciſion of the former caſe which had ſettled the practice of this Court, than adopt that of the latter, by which the practice of the King's Bench was regulated.

Lord Eldon Ch. J.—This caſe has been put upon two grounds; 1ſt, the juſtice of the caſe, 2dly, the ſtat. of *H.* 8. With reſpect to the firſt, though it may often be prudent for a party to overlook a fault in the pleadings and proceed to trial, yet it appears to me that the advantage which he derives from that mode of proceeding is a ſufficient compenſation for his being deprived of the coſts of the pleadings ſubſequent to that fault. Certainly he may be ſaid to have been to blame by contributing to the coſts of thoſe pleadings, though he ultimately ſucceed. If however by the neceſſary conſtruction of the ſtatute of *H.* 8. the avowant be entitled to the coſts of all the pleadings whatever the moral juſtice of the caſe may be, the Court cannot refuſe to allow them. But the next queſtion is whether that be the neceſſary conſtruction of the ſtatute? In the caſe of *Kirk* v. *Nowill* we find the authority of Mr. Juſtice *Buller* (and a very conſiderable authority it is on ſuch a point) for ſaying that a plaintiff in treſpaſs under ſimilar circumſtances is not entitled to all the coſts. In that caſe he alludes to caſes lately decided, and though we do not find any ſuch deciſions in print, we have no reaſon to conclude that they were not treaſured up in the mind of the learned judge. In deciding *Kirk* v. *Nowill* he proceeded on theſe principles, which he ſeems to have conſidered as the principles of the former caſes, *viz.* that the Plaintiff had contributed to the coſts as well as the Defendant, that he ſhould have demurred to the Defendant's plea, and that by going on to trial he was equally in fault. With reſpect to the difference between the ſtatute of *Glouceſter* and the ſtatute of *H.* 8. as the Courts have decided that the words "coſts of the writ" mean coſts of the action, the ſtatute of *Glouceſter* muſt be conſidered as if the latter words had been uſed, and then all the caſes decided upon that ſtatute will become direct authorities in caſes ariſing on the ſtatute of *H.* 8. The caſe of *Broadbent* v. *Wilks* is then relied on; if that had been followed up by long, invariable, and known uſage, the Court would have been bound to enforce that uſage at leaſt *pro hac vice;* but as it is not even pretended that any rule has been brought into familiar practice in conſequence of that deciſion, I think we are at liberty notwithſtanding that caſe to adopt the rule which was laid down in the King's Bench in *Kirk* v. *Nowill*, and which appears to me moſt conformable to juſtice and to the fair conſtruction of the ſtatute of *H.* 8.

HEATH J.—I am of the ſame opinion. It appears to me that this application is not founded either in reaſon or juſtice; that it is not ſupported by precedent, or conformable to the true conſtruction of the ſtatute. As to reaſon and juſtice, if the avowant will not take advantage of a fault in the Plaintiff's pleadings when he has the opportunity of ſo doing, he becomes *particeps criminis.* The ſtatute of *Glouceſter* gives to a plaintiff the coſts of his writ; and the ſtatute of *H.* 8. puts an avowant in the ſame condition as a Plaintiff would be in by the ſtatute of *Glouceſter.* Both ſtatutes were made in *pari materiâ:* the avowant therefore under the ſtatute of *H.* 8. is to recover ſuch coſts as a Plaintiff in a common action would recover under the ſtatute of *Glouceſter.* With reſpect to the authority relied on by the avowant, there are many caſes in *Barnes* which are not law: and whether the miſtake in this inſtance aroſe from the deciſion of the Court, or the inaccuracy of the reporter, ſtill a ſingle deciſion is not entitled to great weight when oppoſed by the authority of another determination in the King's Bench, and when it ſtands in contradiction to reaſon and juſtice and the fair conſtruction of the ſtatute.

ROOKE J.—I am of the ſame opinion. The Avowant in this caſe derives ſufficient advantage from the ſtatute of *H.* 8.; for if we were at liberty to follow our own inclination, ſo far from giving him theſe coſts, we ſhould direct him to pay them to the

Plaintiff. He has taken two iſſues, neither of which he ought to have taken; and all the coſts of the trial have been occaſioned by his default. That ſtatute was not intended to give coſts to an avowant in replevin in a different manner from what they are given by other ſtatutes reſpecting other actions. When coſts are taxed under this ſtatute it muſt be done ſubject to the ſame regulations as in other caſes, in which the coſts of ſuperfluous counts and ſimilar proceedings are deducted. Then by what better rule of diſcretion can we proceed than that which has been adopted in the caſe of a repleader? If a party go to trial upon an immaterial iſſue, the Court muſt go back to the firſt fault upon the pleadings, and award a repleader; in which caſe no coſts are paid by either ſide upon the pleadings ſubſequent to the fault. In this caſe the Plaintiff by the plea in bar has confeſſed the matter of the avowry and the avowant if he had adopted the proper means might have obtained judgment on the confeſſion, without the expence of the ſubſequent proceedings. The caſe of *Broadbent* v. *Wilks* is certainly an authority for the avowant: but we are to conſider whether we can accede to the propriety of that deciſion. It ſtands oppoſed to the authority of *Kirk* v. *Nowill* which though it relate to an action of treſpaſs is not to be diſtinguiſhed from it: and it appears to me that the latter determination is moſt conformable to the true principles of the law.

Rule diſcharged without coſts.

SPARKES *v.* SIMPSON.

Feb. 12th.

Oyer may be prayed at any time before the expiration of 24 hours after the demand of a plea, though the rule to plead be out.

In this caſe a rule to plead in four days was entered on the 24th of *January*, and a plea demanded thereon on the 30th of the ſame month at a quarter before four in the afternoon; on the 31ſt of *January* at two o'clock in the afternoon a demand, in writing, of *oyer* of the bond on which the declaration was founded was ſerved on the Plaintiff's attorney, who without granting *oyer* ſigned judgment on the ſame day. A rule *niſi* for ſetting aſide this judgment having been obtained,

Beſt Serjt. ſhewed cauſe and urged, that where *oyer* is not demanded until the time for pleading is expired, the Plaintiff is entitled to treat the demand as a mere nullity, and referred to 1 *Sellon Pr.* 263. *ed.* 2. and the authorities there cited. He obſerved

ſerved that though the rule be otherwiſe where further time to plead is obtained from a Judge, yet in this caſe as no time had been obtained the time for pleading expired before the demand of *oyer* was made.

Lens Serjt. *contrà* admitted that *oyer* muſt be demanded before the time for pleading is out, but inſiſted that notwithſtanding the expiration of the rule the Defendant has twenty-four hours after the demand of the plea, and that as *oyer* had been demanded in this caſe within twenty-four hours after the demand of a plea, the Plaintiff was not entitled to ſign judgment without granting *oyer*.

The Court were of this opinion, and relied on the caſe of *The Duke of Leeds* v. *Vevers*, *Barnes*, 268. *ed.* 3.

Rule abſolute.

THE END OF HILARY TERM.

During the Vacation the Great Seal was, on the reſignation of Lord LOUGHBOROUGH, delivered to Lord ELDON Lord Chief Juſtice of the Court of *Common Pleas*, who was appointed Lord High Chancellor of *Great Britain*. His Lordſhip however continued to hold the ſituation of Lord Chief Juſtice of the Court of *Common Pleas*.

Sir JOHN MITFORD Knt. His Majeſty's Attorney General, reſigned his office at the latter end of *Hilary* Term, and was elected Speaker of the Houſe of Commons.

EDWARD LAW Eſq. one of His Majeſty's Counſel learned in the law, was appointed Attorney General, and was knighted.

Sir WILLIAM GRANT Knt. His Majeſty's Solicitor General, reſigned his Office, and was ſucceeded by

The Honorable SPENCER PERCEVAL, one of His Majeſty's Counſel learned in the law.

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CASES

1801.

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Eaſter Term,

In the Forty-firſt Year of the Reign of GEORGE III.

SCURRY qui tam *v.* FREEMAN.

April 23d.

DEBT on the ſtatute of Uſury.

The cauſe was tried before *Chambre* J. at the Guildhall Sittings after *Hilary* Term, when the facts in evidence were as follow:—In *September* 1794 the Defendant lent the ſum of 500*l.* to one *Robert Hooley* upon his bond, and an aſſignment by way of mortgage of certain leaſehold premiſes. At the time of the loan it was underſtood that *Hooley* was to give ſomething more than legal intereſt as a compenſation, but no particular ſum was agreed upon. After the ſecurities were executed and the money advanced the parties went together to another place where *Hooley* offered the Defendant 50*l.*, who directed him to give it to his ſon then preſent; which was accordingly done. Intereſt at the rate of 5*l.*

A. lent *B.* 500*l.*, and at the time of the loan it was agreed that the latter ſhould give ſomething more than legal intereſt as a compenſation, but no particular ſum was ſpecified. After the execution of the deed *B.* gave *A.* 50*l.* and paid intereſt at the rate of 5*l. per cent.* on the 500*l.* for five years; at the end of which time an action was brought againſt *A.* for uſury.—Held that the action was not barred by lapſe of time, for that the loan was ſubſtantially for no more than 450*l.* and conſequently the intereſt at the rate of 5*l. per cent.* on the 500*l.* received within the laſt year was uſurious. If a draft be given for uſurious intereſt and a receipt taken for it in the county of *A.*, and the draft be afterwards exchanged for money in the county of *B.*; the uſury is committed in the county of *B.* and the *venue* muſt be laid there.

1801.
Scurry
v.
Freeman.

per cent. was paid on 500*l.* until the 19th of *January* 1797, when the ſecurities were changed and new deeds given to ſecure the 500*l.* and 5 *per cent.* intereſt, which was paid from time to time up to the 26th *December* 1799. On the laſt mentioned day 25*l.* was paid to the Defendant as one year's intereſt on 500*l.* by a draft on a banker, which draft was received as caſh and a receipt accordingly given for it by the Defendant at a houſe in *Bedford-Row* in the county of *Middleſex*, but which was afterwards exchanged for money by him with a third perſon in *Weſt Smithfield London*. The *venue* was laid in *London*. At the trial it was contended on behalf of the Defendant, 1ſt, That as the crime of uſury, ſo as to ſubject the party committing it to penalties, is complete on the taking of the uſurious intereſt, the crime of uſury was in this caſe complete on the receipt of the 50*l.* given by way of compenſation for the loan in *September* 1794 (*a*), and conſequently the time was long ſince expired within which this action ſhould have been brought; for that ſince that time nothing more than 5*l. per cent.* had been received on the 500*l.*; 2dly, That the *venue* was improperly laid in *London*, for ſuppoſing the receipt of the laſt 25*l.* as one year's intereſt to be deemed uſurious, ſtill it was received in *Bedford-Row*, which is in *Middleſex*. The Jury under the direction of the learned Judge found a verdict for the Plaintiff.

Beſt, Serjt. now moved to have a nonſuit entered, relying on the objections taken at the trial, and in ſupport of the firſt referred to *Lloyd qui tam.* v. *Williams*, 3 *Wilſ.* 250. and *Fiſher qui tam* v. *Beaſley*, *Dougl.* 235.

But *The Court* (conſiſting of *Heath*, *Rooke*, and *Chambre*, Judges) were very clearly of opinion, that the receipt of 25*l.* as one year's intereſt was uſurious, inaſmuch as the loan could only be deemed a loan of 450*l.* ſince the Defendant had taken back 50*l.* out of the 500*l.*; and alſo that the draft on the banker was merely a promiſe to pay, whereas the actual receipt of the money conſtituting the uſury took place in *Smithfield*, which was in *London* (*b*).

Beſt took nothing by his motion.

(*a*) On a contract to forbear 600*l.* for a year, reſerving intereſt at the rate of 5*l. per cent*, if a premium be taken at the time of the loan, the crime of uſury is complete the inſtant any part of the growing intereſt is received by the lender. *Wade q. t.* v. *Wilſon*, 1 *Eaſt.* 195.

(*b*) If an uſurious contract be entered into by a deed executed in *London* appointing *A.* the lender to be receiver of *B.* the borrower's rents in *Middleſex*, with a pretended ſalary, and *A.* receive the rents in *Middleſex*, but ſettle for the balance with *B.* in *London*, the *venue* in an action on the ſtatute is well laid in *London*. *Scott q. t.* v. *Breſt*, 2 *Term Rep.* 238. Indeed it ſeem. that it might be laid either in *London* or *Middleſex*, *per Aſhhurſt* J. *Ib.* 240.

1801.

CASTLEMAN, Executor of CASTLEMAN *v.* RAY, Executor of RAY.

April. 24th.

An unſtamped draft drawn on "*A. B.* bricklayer" is not within the exception of 23 *Geo.* 3. *c.* 49. *ſ.* 4. in favour of drafts drawn on perſons acting as bankers within 10 miles of the place where the draft is drawn. If at the bottom of ſuch a draft there be an acknowledgment of the drawee that a third perſon paid it for him, that acknowledgment cannot be received in evidence.

INDEBITATUS *aſſumpſit* for money had and received and on an account ſtated. The Defendant pleaded a tender as to part and a ſet-off as to the reſt.

At the trial of this cauſe at the Guildhall Sittings after laſt *Hilary* Term before *Chambre* J., the Defendant in order to ſupport his plea of ſet-off tendered in evidence an unſtamped paper of which the following is a copy—

" Mr. *Caſtleman*

Pleaſe to pay the bearer 30*l.* 8*s.*; his receipt will be your diſcharge, from

Yours, &c.

Standgate, *Sep.* 3, 1790. THO. MOSELEY.

Mr. *Caſtleman*, Bricklayer,
Camberwell.

Paid by *Richd. Ray*
for *Charles Caſtleman.*"

The words "Paid by *Richd. Ray*" were in the hand-writing of the Defendant's teſtator, and the words "for *Charles Caſtleman*" in the hand-writing of the Plaintiff's teſtator. It was objected that this paper not being ſtamped could not be received in evidence, being a draft or order within the meaning of 23 *Geo.* 3. *c.* 49. *ſ.* 2. (which act was in force at the time the draft was drawn) and not falling within the exception in *ſ.* 4. of that act which exempts every draft or order for the payment of money on demand upon any banker or perſon or perſons acting as a banker reſiding or tranſacting the buſineſs of a banker within ten miles of the place of abode of the perſon or perſons drawing ſuch draft or order, from being ſtamped. The learned Judge being of that opinion, refuſed to receive the paper in evidence, and a verdict was found for the Plaintiff.

Runnington Serjt. now moved for a rule calling on the Plaintiff to ſhew cauſe why a new trial ſhould not be had, contending 1ſt, That *Caſtleman* upon whom the draft was drawn, though not a banker by buſineſs, might be conſidered as a perſon acting as a banker within the meaning of the act, having been treated by the drawer as ſuch; 2dly, Admitting that the paper could not be received

1801.

CASTLEMAN *v.* RAY.

received in evidence as a draft, yet that as *Caſtleman* had acknowledged at the bottom of it, under his own hand, that *Ray* had paid the money mentioned in the paper for his uſe, the Defendant ought not to be precluded from giving that acknowledgment in evidence merely becauſe it ſtood on the ſame paper as the draft; that the acknowledgment if written on a ſeparate piece of paper would not have required a ſtamp ſince it was not in the nature of a receipt. *Fiſher* v. *Leſlie*, *Eſp. N. P. Caſ.* 426.

But *The Court* (conſiſting of *Heath*, *Rooke*, and *Chambre* Judges) were of opinion, that the evidence was properly rejected, for that the acknowledgment of *Caſtleman* could not be made available without giving effect to the draft.

Runnington took nothing by his motion.

April 24th.

ONSLOW, Demandant *v.* SMITH, Tenant.

Aid-prayer is a dilatory plea within 4 *Ann. c.* 16. and muſt be verified by affidavit. If the tenant in a writ of right pray aid after a general imparlance it is good cauſe of demurrer: and the Court will give judgment thereupon that the tenant anſwer alone.

THIS was a writ of right brought to recover a piece of garden ground and curtilage, with the appurtenances, in the borough of *Horſham*.

The Demandant counted in *Eaſter* Term 1800, and laid the right and ſeiſin within ſixty years by taking the eſplees in his father *Denzill Onſlow* from whom the right deſcended to himſelf. The tenant obtained three general imparlances, 1ſt, To the Morrow of the *Holy Trinity*, 2dly, To the Morrow of *All Souls*, and 3dly, Till Eight Days of *Saint Hilary*. "At which day the Demandant cometh here into Court by his ſaid attorney, and the tenant by his attorney aforeſaid, and the ſaid tenant ſays, that long before the day of ſuing out the original writ of the ſaid Demandant, the Right Honourable *Charles* Lord Viſcount *Irwin* of the kingdom of *Scotland* was ſeiſed of the tenement aforeſaid with the appurtenances in his demeſne as of fee, and being ſo ſeiſed on, &c. made his laſt will and teſtament; (Here the tenant ſet out the limitations in the above will, by which a title was derived to Lady *Irwin* for her life, remainder to Lord *Irwin*'s daughter *Iſabella Ann* Lady *Beauchamp* for her life, remainder to the ſecond third and other ſons of Lady *Beauchamp* in tail male, remainder to his daughter *Frances* for her life, remainder to her firſt and other ſons in tail male, remainder to his daughter *Elizabeth* for her life, remainder to her firſt and other ſons in tail male, with ſeveral other remainders over; the tenant then averred the death of Lord *Irwin*, whereby Lady *Irwin* became ſeiſed for her life, and that ſhe by leaſe and releaſe of the 28th and 29th of *May* 1790, conveyed her life intereſt to the tenant; and that Lady *Beauchamp* had no ſecond ſon, and *Frances* no ſon.) And the ſaid tenant further ſays that the ſaid *Elizabeth* afterwards and before the ſuing out of the ſaid original writ of the ſaid Demandant, at the borough of *Horſham* aforeſaid intermarried with one *Hugo Meynell* Eſquire, and the ſaid *Hugo Meynell* and *Elizabeth* have iſſue between them lawfully begotten one *Hugo Meynell* their firſt ſon who is now living, to whom and to the heirs male of his body iſſuing, the tenement aforeſaid with the appurtenances after the death of the ſaid Viſcounteſs, and after the reſpective deaths of the ſaid *Iſabella Ann*, *Frances*, and *Elizabeth*, and in default of ſuch iſſue of their reſpective bodies as aforeſaid doth belong and without which ſaid *Hugo Meynell* the ſon, the ſaid tenant cannot draw into plea the aforeſaid tenement with the appurtenances nor anſwer the ſaid Demandant thereof, wherefore he prays aid of the ſaid *Hugo Meynell* the ſon."

"And the ſaid Demandant proteſting that the ſaid *Charles* Lord Viſcount *Irwin* of the kingdom of *Scotland* was not ſo ſeiſed of the tenement aforeſaid with the appurtenances as the ſaid tenant hath above ſuppoſed, ſays, that the matters alleged by the ſaid tenant in manner and form as the ſame are above ſtated and ſet forth, are not ſufficient in law for the ſaid tenant to have aid of the ſaid *Hugo Meynell* the ſon, wherefore he prays judgment, and that the ſaid tenant may anſwer the ſaid Demandant in the plea aforeſaid without the aid of the ſaid *Hugo Meynell*. And for cauſes of demurrer in law the ſaid Demandant ſets down and ſhews to the Court here the following that is to ſay, for that the ſaid tenant hath prayed the aid of the ſaid *Hugo Meynell* the ſon, in a term ſubſequent to that in which the ſaid Demandant counted againſt the ſaid tenant, and after an imparlance had been prayed by and granted to him; and alſo for that the ſaid tenant hath not made any *profert* of the ſaid ſeveral indentures which he hath alleged to have been reſpectively made on the 28th and 29th days of *May* in the year of our Lord 1790 aforeſaid, or of either of ſuch indentures, nor hath he ſet forth any legal excuſe for not ſhewing the ſame or either them to the Court here; and for that the ſaid aid-prayer is in various other reſpects uncertain, inſufficient, and informal."

"And

1801.
Onslow
v.
Smith.

" And the ſaid tenant ſays that the matters and things by him alleged in manner and form as the ſame are above ſtated and ſet forth, are ſufficient in law for him the ſaid tenant to have aid of the ſaid *Hugh Meynell* the ſon, and this he is ready to verify and prove as the Court, &c. And becauſe the ſaid Demandant hath not made any anſwer to the ſaid aid-prayer, nor hitherto denied the ſame, the ſaid tenant prays judgment, and alſo as before prays aid of the ſaid *Hugo Meynell* the ſon."

This caſe was to have been argued laſt *Michaelmas* Term by *Beſt* Serjt. in ſupport of the demurrer, and *Bayley* Serjt. *contra;*

But *The Court* being of opinion that the aid-prayer was a dilatory plea within the ſtatute of *Ann*, and indeed the moſt dilatory which could be pleaded, ſince an infant in arms might be prayed in aid and the parol would demur till he came of age, obſerved that it muſt be verified by affidavit.

Beſt then inſiſted, that as the tenant had omitted to verify by affidavit, the Court would not then give him time to do ſo, but would give judgment on the demurrer that the tenant ſhould anſwer to the Demandant without aid.

But *The Court* anſwered that no ſuch judgment could be given until default after default; that the courſe which the tenant ought to follow was to ſue out a writ of ſummons *ad jungendum auxilium*, and that if the prayee then made two defaults judgment might be given that the tenant ſhould anſwer without him. They therefore gave leave to the tenant to verify his plea by affidavit, ſaying at the ſame time that the Demandant was at liberty to withdraw his demurrer.

The tenant accordingly verified his aid-prayer by affidavit; but the Demandant not having withdrawn his demurrer, it now came on to be argued;

Beſt Serjt. for the Demandant. The firſt objection to the aid-prayer is, that it has been prayed after a general imparlance, *Booth on Real Actions*, *p.* 61. Now that an aid-prayer is a dilatory plea need not be argued, ſince the Court have decided that point, by requiring that it ſhould be verified by affidavit. If indeed it be contended that the conſequence of eſtabliſhing that aid cannot be prayed after a general imparlance would be, that aid ſo prayed might be treated as a nullity, and could not be demurred to; it may be anſwered that in *Buddle* v. *Willſon*, 6 *Term Rep.* 369. which was a demurrer to a plea in abatement pleaded after a general imparlance, the Court gave judgment of *reſpondeas ouſter* on the demurrer. So in the preſent caſe the Court may give judgment that the tenant anſwer without aid. In fact the tenant for life and the remainder-man may be compared to two joint-tenants, one of whom if ſued alone has a right to plead in abatement, but may be deprived of that advantage if he neglect to plead in abatement until after a general imparlance. The ſecond objection is, that no *profert* has been made of the deeds ſtated in the aid-prayer, under which the tenant derives his title.

[Heath J.—There is nothing in this laſt objection: for it is unneceſſary to make *profert* of any deed which has its operation under the ſtatute of Uſes (*a*).]

Bayley for the Tenant.—The objection which has been taken to this aid-prayer, that it cannot be pleaded after a general imparlance, is not well founded. The paſſage referred to in *Booth* 61. is this; " In real actions aid ought to be demanded at the firſt day the tenant hath to plead, that is before imparlance." In ſupport of this *Booth* refers to 3 *H.* 6. 5. which does not ſupport the above propoſition. Indeed *Booth* himſelf in *p.* 94, ſpeaking of the writ of right patent, ſays " After the view and imparlance, the tenant may plead or vouch, or pray in aid if he be tenant for life." And in *Co. Entr.* 48. tit. *Annuitie*, *pl.* 1. there is a precedent in which aid was not only once prayed after a general imparlance, but the prayees after having been joined in aid obtained another general imparlance, and then prayed in aid the reverſioner. To grant aid where it ought not to be granted is not error, but to refuſe it where it ought to be granted is error. *Bro. Abr.* tit. *Ayde*, *pl.* 118 (*b*).

Beſt in reply.—Precedents of pleading cannot be oppoſed in point of authority to decided caſes, ſince they are not ſanctioned by the judgment of the Court. *Viner*, when conſidering at what time aid ought to be demanded by the tenant, ſays " He ought to demand it the firſt day of the term he begins to plead." *Vin. Abr.* tit. *Aid of a Common Perſon*, F. a. and cites 2 *H.* 6. 5. *b.* (*c*);

(*a*) See the caſes on this ſubject collected by *Williams* Serjt. in his edition of *Saunders*, *Jevens* v. *Harridge*, *p.* 9. *a. in notis*, and alſo 8 *Term Rep.* 573. *Banfill* v. *Leigh and another*, where Lord *Kenyon* mentions a conveyance to uſes as an inſtance in which profert need not be pleaded.

(*b*) See alſo to the ſame effect 8 *H.* 7. 11. *Per Huſſey*. And the ſame rule prevails with reſpect to *oyer*. 6 *Mod.* 28. 2 *Salk.* 498. 2 *Ld. Raym.* 969. *Longueville* v. *Thiſtleworth*.

(*c*) This is miſ-printed in *Viner* for 3 *H.* 6. 5. *b.*

and in the next paragraph he adds "If a plea be adjourned from one term to another, in the other term he ſhall not have it. 3 *H.* 6. 5. *b.*" Now an imparlance is an adjournment. The two paſſages in *Booth* may be reconciled, by ſuppoſing that in one he ſpeaks of a general, and in the other of a ſpecial imparlance.

The Court at firſt inclined to overrule the demurrer, and obſerved, that the tenant having only a life-eſtate was bound at the peril of a forfeiture to pray in aid the remainder-man; that in this caſe therefore the only queſtion was, whether aid had been properly prayed; and that although it might perhaps have been a ſubject of demurrer, if it had appeared on the face of the aid-prayer that the tenant had no right to demand aid of the prayee, yet it did not follow that the Demandant was entitled to demur on account of a ſuppoſed informality in the aid-prayer, ſince if it were quaſhed on this demurrer, the intereſts of the remainder-man would be affected without his being in Court to defend himſelf, and the tenant could not be adjudged to anſwer by himſelf until the prayee had made default after default. *Cur. adv. vult.*

On this day the judgment of the Court (preſent ROOKE and CHAMBRE Juſtices) was delivered by

HEATH, J.—The queſtion is, whether after a general imparlance aid-prayer lies? It is a clear principle of law that no dilatory plea can be pleaded in another term after a general imparlance, and it is clear that aid-prayer is a dilatory plea: the law is ſo laid down, in *Booth* 61. 1 *Rol. Abr.* 185. and *Hard.* 179. On behalf of the tenant, there have been cited as authorities, *Booth* 94. and two precedents in *Coke's Entries*, *fo.* 48. As to the paſſage in *Booth* it is extremely inaccurate, for it refers to a former paſſage in the ſame book, which directly contradicts it, and cites *Coke's Entries*, *fo.* 182. *pl.* 4. where I find that no imparlance whatever was antecedently granted. I have looked into *Coke's Entries*, *fo.* 48. *a.* and 629. *b.* (*a*). In the firſt of theſe *Entries* the imparlance was granted in the ſame term: the ſecond of theſe *Entries* is a precedent for the tenant ſo far as it goes, but I think it is of but little weight, becauſe the granting aid where none is of right demandable is not error. It might be the intereſt of the Demandant to acquieſce in the demand, inaſmuch as it enabled him to obtain a more complete judgment againſt the tenant for life and remainder-man, inſtead of obtaining it againſt the tenant for life only. *Quiſque poteſt renun-*

(*a*) Tit. *Scire facias*, *pl.* 12.

tiare juri pro ſe introducto. The diſtinction is clearly taken by *Martin*, once a juſtice of this bench, that an indefinite number of aid-prayers may be ſucceſſively taken after an imparlance in the ſame term, but the tenant ſhall not have aid after a general imparlance in another term. 3 *H.* 6. 5. *b.* We are all of opinion, that in this caſe the demurrer ought to be allowed, and the judgment of the Court is, that the tenant ſhall anſwer alone without the aid of *Hugo Meynell* the ſon (*a*).

Hammersley *v.* Mitchell.

April 27th.

An affidavit to hold to bail made by Plaintiff's clerk expreſsly negativing a tender in bank-notes, held bad.

In this caſe the Plaintiff's clerk having made an affidavit of debt to hold the Defendant to bail, in which he had ſworn poſitively to the debt and negatived any tender in bank-notes, in the ſame way as in *Smith* v. *Tyſon*, *ante*, *p.* 339.;

Beſt Serjt. on the authority of the above caſe obtained a rule *Niſi* for diſcharging the Defendant on a common appearance.

Shepherd Serjt. now ſhewed cauſe, and urged, that notwithſtanding the caſe of *Smith* v. *Tyſon* the Court would probably chooſe to reconſider the rule they had adopted, inaſmuch as the Court of *King's Bench* had ſince the determination of that caſe, and with a full knowledge of it, decided (*b*) differently, and refuſed to grant ſuch an application as the preſent, obſerving that if the principle of that caſe could be ſupported it would be neceſſary for all the partners to join in the affidavit where they were joined in the action.

(*a*) There ſeems to be a diſtinction between judgments againſt the tenant upon demurrer to the aid-prayer and judgments againſt him where the Demandant counterpleads the aid-prayer; in the former caſe it is not final, in the latter it is. Thus in *Bro. Ab.* tit. *Peremptory*, *pl.* 76. it was ſaid by *Seton* "if the tenant prays aid, and the Demandant counterpleads, and the tenant pleads eſtoppel againſt the counterplea, which is adjudged againſt him, this is peremptory; but upon demurrer upon the aid this is not peremptory." So in 2 *Leon* 52. where in a writ of *partitione faciendâ* the Defendant prayed in aid, and the Plaintiff counterpleaded, upon which iſſue was joined and found for the Plaintiff, it was held to be peremptory, and that the judgment ſhould be *non quod reſpondeat ſed quod partitio fiat*. In this reſpect, as in many others, the aid-prayer appears to reſemble a plea in abatement; to which if Plaintiff demur and ſucceed on the demurrer, judgment ſhall be that Defendant *reſpondeat ouſter*; but if iſſue be taken on the plea, and found againſt the Defendant, the judgment ſhall be final. See *Com. Dig.* tit. *Abatement*, I. 14, 15.

(*b*) The name of the caſe was *Madox* v. *Abercomby*, the application was made by *E. Morris* on facts preciſely ſimilar with thoſe of *Smith* v. *Tyſon*, and on the authority of that caſe in *Hil.* 41 *Geo.* 3., and refuſed by the Court of *K. B.* See alſo *The Mayor of London* v. *Dias*, 1 *Eaſt.* 239. and *Knight* v. *Keyte*, 1 *Eaſt.* 415. to the ſame effect.

1801.
Hammersley
v.
Mitchell.

But *The Court* (conſiſting of Heath, Rooke, and Chambre Juſtices) adhered to their former opinion; and Chambre J. obſerved, that it would be difficult to ſay that the Deponent had not committed perjury, ſince he had ſworn to a fact not within his knowlege.

Rule abſolute.

April 27th.

Chatterley *v.* Finck.

Hollings *v.* Same.

A perſon employed in *London* as agent to one reſiding at a diſtance in the country with a power of attorney to collect his debts, may make an affidavit of debt poſitively denying any tender in bank-notes.

In theſe caſes the affidavits to hold to bail were made by one *Robert Anderſon*, agent to the Plaintiffs, and were preciſely ſimilar to that in the laſt caſe. Accordingly

Vaughan Serjt. obtained a rule *Niſi* for diſcharging the Defendants on entering common appearances.

Againſt thoſe rules *Beſt* Serjt. now ſhewed for cauſe affidavits ſtating that the Plaintiffs reſided at *Stafford*, and that the ſaid *Robert Anderſon* being reſident in *London*, was appointed their agent by power of attorney, for the ſpecial purpoſe of obtaining payment of the debts for the recovery of which theſe actions were brought, and for compounding and ſettling the ſame as he ſhould in his diſcretion think moſt fit.

The Court (conſiſting of Heath, Rooke, and Chambre, Juſtices) were of opinion that the facts diſcloſed in the affidavit now produced, ſufficiently accounted for the Plaintiff's agent being able to negative ſo poſitively the tender in bank-notes.

Rules diſcharged.

April 28th.

Stacey and Two others *v.* Federici.

An affidavit of debt made by one of three partners denying any tender in bank-notes to himſelf "or to either of his partners to the beſt of his knowledge and belief," is ſufficient.

The Court will not diſcharge a Defendant on common bail on the ground of his having obtained a certificate as a bankrupt and of the debt being thereby barred, if the validity of the certificate is meant to be diſputed.

One of the three Plaintiffs, who were partners, having made the affidavit to hold to bail, in which he ſwore poſitively to the debt, and expreſsly negatived any tender in bank-notes having been made to himſelf, or to either of his partners to the beſt of his knowlege and belief;

Beſt Serjt. obtained a rule *Niſi* for cancelling the bail-bond and entering an *exoneretur* on the bail-piece, 1ſt, becauſe all the Plaintiffs had not joined in the affidavit to hold to bail; and 2dly, on an affidavit ſtating that a commiſſion of bankrupt had iſſued againſt the Defendant, who had obtained his certificate, and that the debt in queſtion had accrued previous to the iſſuing of the commiſſion.

Shepherd Serjt. ſhewed cauſed and contended, 1ſt, that as it was not neceſſary before the paſſing of the bank-act that all the Plaintiffs ſhould join in an affidavit to hold to bail, it was not the intention of the Legiſlature to compel them to do ſo now; 2dly, that it did not appear by the Defendant's affidavit that the debt accrued prior to the act of bankruptcy, without which the certificate would be no bar. *Bamford* v. *Burrell*, *ante*, *p.* 1. He alſo produced an affidavit, ſtating that the validity of the certificate was the point intended to be conteſted at the trial; and urged that the Court would not prejudice that queſtion on a ſummary application.

The Court (conſiſting of HEATH, ROOKE, and CHAMBRE Juſtices) were of opinion, that the affidavit to hold to bail was ſufficient; and that though the affidavit upon which the rule was granted was good *primâ facie* evidence of the debt having accrued prior to the act of bankruptcy, yet that as the validity of the certificate was diſputed they could not interfere in a ſummary way.

Rule diſcharged.

The Earl of RADNOR *v.* REEVE.

April 28th.

If the judgment of Commiſſioners of appeal in certain caſes be declared final by ſtatute, their judgment cannot be queſtioned in an action of treſpaſs.

TRESPASS for breaking the Plaintiff's houſe and taking away his goods. Plea Not-guilty.

This action was brought againſt the Defendant who was collector of the duties on male ſervants, houſes, windows, horſes and dogs, for diſtraining goods in the Plaintiff's houſe for one year's duty and ſurcharge on one male ſervant. The Plaintiff had appealed againſt the ſurcharge to a meeting of the Commiſſioners, on the ground that the male ſervant in queſtion was a day-labourer. The Commiſſioners diſmiſſed the appeal (*a*), and the Defendant in conſequence made a diſtreſs upon the Plaintiff's goods to ſatify the duty. When this cauſe came on to be tried before Lord *Eldon* Ch. J. at the *Weſtminſter* Sittings after laſt

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(*a*) By 25 *G.* 3. *c.* 43. *ſ.* 35. the appeal is given; and by *ſ.* 38. and 39. declared final unleſs a caſe be ſtated for the opinion of a Judge. By 37 *Geo.* 3. *c.* 107. the duties are increaſed, and the former powers reſerved to the Commiſſioners.

1801.

The Earl of RADNOR *v.* REEVE.

Michaelmas Term, a verdict was found for the Plaintiff ſubject to the opinion of this Court upon a caſe reſerved.

The caſe being now called on for argument, and the Court intimating that it was not open to diſcuſſion, inaſmuch as they had no juriſdiction, the determination of the Commiſſioners being final;

Lens Serjt. endeavoured to obviate that objection by citing *Milward* v. *Caſſin*, 2 *Bl.* 1330. and *Harriſon* v. *Bullcock*, 1 *H. Bl.* 68., in the former of which caſes the Court of *Common Pleas* had entertained a queſtion reſpecting a poor-rate which had been confirmed by the Seſſions on appeal, and in the latter a queſtion on the land-tax, after an appeal to the Commiſſioners which had been diſmiſſed, and obſerved that if the Commiſſioners in this caſe had taxed the Plaintiff for a ſervant not falling within the deſcription of the act they had exceeded their juriſdiction.

But *The Court* (conſiſting of HEATH, ROOKE and CHAMBRE Juſtices) ſaid, that it had been determined by all the Judges of *England*, that when a ſtatute provides that the judgment of Commiſſioners appointed thereby ſhall be final, their deciſion is concluſive, and cannot be queſtioned in any collateral way.

Judgment for the Defendant (*a*).

(*a*) See the words of *Yates* J. in *Strickland* v. *Ward*, 7 *Term Rep.* 634. *in notis*, "that a conviction of a juſtice could not be controverted in evidence, that the juſtice having a competent juriſdiction of the matter his judgment was concluſive till reverſed or quaſhed; and that it could not be ſet aſide at *Niſi Prius*." But where a ſtatute (13 *G.* 3. *c.* 78. *ſ.* 19.) directed that an order of juſtices for turning a footway confirmed on appeal to the Quarter Seſſions ſhould be final; and in a ſubſequent ſection (*ſ.* 69.) provided that certain forms ſet forth in a ſchedule ſhould be uſed on all occaſions, and that no objection ſhould be taken for want of form in any ſuch proceedings; it was held that a material variance from the form preſcribed was fatal to the order, and might be taken advantage of in an action of treſpaſs, notwithſtanding the order had been confirmed on appeal to the Seſſions. *Daviſon* v. *Gile*, 1 *Eaſt*. 64.

April 28th.

VAUGHAN *v.* BARNES.

The Court will not order money paid into Court by the Defendant through a miſtake to be reſtored to him. Though perhaps in caſe of fraud they may.

TWO actions having been commenced againſt the Defendant in this caſe for goods ſold and delivered, one of which was at the ſuit of the Plaintiff, and the other at the ſuit of a third perſon; the Defendant to the firſt pleaded a tender of 28*l.* 8*s.* and paid the ſame into Court, which was taken out by the Plaintiff; and to the laſt he pleaded the general iſſue, conſidering that the Plaintiff *Vaughan* was the only perſon entitled to recover for any of the goods delivered, but that he had demanded more than was actually due. The action to which the general iſſue only was pleaded coming on to be tried firſt the Plaintiff obtained a verdict; after which the Defendant procured a bill of particulars from the preſent Plaintiff, which ſtated his demand to be 20*l.* 3*s.* Upon this *Beſt* Serjt. having obtained a rule calling on the Plaintiff to ſhew cauſe why the ſum of 8*l.* 5*s.* being the difference between the ſum paid into Court and that ſtated in the Plaintiff's particulars ſhould not be refunded to the Defendant, was now called upon to ſupport his rule. He urged that although the Court would not in general order money to be refunded which had been paid into Court by a Defendant, yet that in a caſe like the preſent where the Defendant had acted under a complete miſtake, and where the Plaintiff's own particulars ſhewed that his demand did not amount to ſo much as he had taken out of Court, they would not adhere to a rule which would work injuſtice.

But *The Court* (conſiſting of HEATH, ROOKE and CHAMBRE Juſtices) were of opinion, that the Defendant pays money into Court at his peril, and that the Court would never order it to be reſtored unleſs it appeared that ſome fraud or deceit had been practiſed upon him; and added, that almoſt every Defendant pays ſomething more into Court than he believes to be due, that he may be certain of covering the juſt demand, and that conſequently if the Court were to attend to the preſent application there would be no end to motions of this kind.

Rule diſcharged (*a*).

(*a*) In *Crockay* v. *Martin*, *Barnes*, 281. the Plaintiff having died before trial, the Defendant moved to have the money paid back to him, but the Court refuſed the application. *See* on the general head of taking money out of Court, the note of Mr. Serjt. *Williams* in *Birks* v. *Tippet*. 1 *Saund.* 33. alſo *Le Grew* v. *Cooke*, *ante*, vol. 1. p. 332. and the notes to that caſe.

THOMAS *v.* WARD.

April 29th.

The rule that final judgment cannot be ſigned till four days after the return of the *habeas corpus juratorum* does not extend to a caſe where the term cloſes before the four days are expired.

IN this caſe the writ of *habeas corpus juratorum* was returnable on the 9th day of the month; on the evening of the 12th being the laſt day of the term final judgment was ſigned. On this *Beſt* Serjt. obtained a rule *Niſi* for ſetting aſide the judgment, and now in ſupport of that rule referred to 1 *Sell. Pr.* *ed.* 1792.

p. 496. where it is laid down that four days excluſive from the return of the *habeas corpus* are allowed for any motion in arreſt of judgment or for a new trial.

Shepherd Serjt. *contrà* was ſtopped by *The Court* (conſiſting of HEATH, ROOKE and CHAMBRE Juſtices) who after enquiry of the officers declared the rule laid down in *Sellon's Practice* not to extend to caſes where the term cloſes before the four days are expired.

Rule diſcharged.

April 29th.

WILSON *qui tam v.* VAN MILDERT, Clerk.

Where three pariſh churches have been united by 22 *Car.* 2. *c.* 11. the benefice may be deſcribed in pleading as one rectory.

THIS was an action for non-reſidence. The firſt count in the declaration deſcribed the Defendant's benefice as "the parſonage of the rectory and pariſh church of the united pariſhes of *St. Mary Le Bow St. Pancras Soaper-Lane* and *Alhallows Honey Lane.*" The ſecond count deſcribed it as "a certain rectory to wit, the rectory of the pariſh church of the united pariſhes &c." as in the preceding count.

The cauſe was tried before Lord ELDON Ch. J. at the Guildhall Sittings after laſt *Michaelmas* Term, when a verdict was found for the Plaintiff, with liberty to the Defendant to move to enter a nonſuit, on the ground of the benefice being improperly deſcribed in the declaration. By the ſtatute of 22 *Car.* 2. *c.* 11. *ſ.* 63. which was paſſed for the uniting certain pariſhes after the fire of *London*, it is provided that "the pariſhes of *St. Mary le Bow St. Pancras Soaper-Lane* and *Alhallows Honey-Lane* ſhall be united into one pariſh and the church heretofore belonging to the ſaid pariſh of *St. Mary le Bow* ſhall be the pariſh church of the ſaid pariſhes ſo united." The 68th ſection alſo enacts "that notwithſtanding ſuch union as aforeſaid each and every of the pariſhes ſo united as to all rates taxes parochial rights charges and duties and all other privileges liberties and *reſpects whatſoever* other than what are herein mentioned and ſpecified ſhall continue and remain diſtinct and as heretofore they were before the making of this preſent act, and that the ſeveral and reſpective patrons of the ſaid churches ſo united ſhall and may preſent by turns to that church only which by this act is appointed to be rebuilded and eſtabliſhed for the pariſh church of the pariſhes ſo united as aforeſaid, the firſt preſentment to be made by the patron of ſuch of the ſaid churches the endowments whereof are of the greateſt value." In the letters of inſtitution the Defendant was deſcribed as "rector of the rectory and pariſh church of *St. Mary le Bow* with the rectories of *St. Pancras Soaper-Lane* and *Alhallows-Honey-Lane* thereunto annexed."

A rule *Niſi* for ſetting aſide the verdict and entering a nonſuit having been obtained in the courſe of laſt term,

Bayley Serjt. now ſhewed cauſe. The queſtion is, Whether the Plaintiff has done right in deſcribing the Defendant's benefice as one rectory? In *Spelman's Gloſſary* Rectoria is put *pro integrâ eccleſiâ parochiali cum omnibus ſuis juribus pratis decimis aliiſque proventuum ſpecibus; aliàs vulgò dictum beneficium.* The rectory and benefice therefore are conſidered as ſynonimous. In 1 *Bl. Com.* 384. it is ſaid "that a parſon is one that hath full poſſeſſion of all the rights of a *parochial* church and that he is ſometimes called the rector or governor of the church." The rectory therefore means that over which the parſon of the church is rector, and if there be but one pariſh there can be but one rectory. It is true that before the ſtatute of *Car.* 2. there were three rectories, but the effect of that ſtatute was to make a union of the three and convert them into one. Previous to the ſtatute there were three churches, but by the ſtatute the churches are united; there is now but one church, one benefice, one advowſon, and therefore there can be but one rectory. It appears from the opinion of *Powell* J. in *Reynoldſon* v. *Blake*, 1 *Ld. Raym.* 196. that after a union at common law there is but one church, and one benefice and one advowſon. To the ſame effect is *Dyer* 269. *b.* and *Cro. Car.* 987. In the caſe of *The Grocer's Company* v. *The Archbiſhop of Canterbury*, 3 *Wilſ.* 214. which related to the very pariſhes mentioned in this declaration, they were deſcribed in the pleadings as one rectory. And it appears from the caſe of *St. Swithin* v. *St. Mary Bothaw*, *Skin.* 588 and 616. that under a union by the ſtatute of *Charles* the Second, not only the churches but the pariſhes are united.

Shepherd and *Beſt* Serjts. in ſupport of the rule. The 68th ſection of the act provides, that the pariſhes therein mentioned ſhall continue diſtinct in all reſpects whatſoever except in thoſe which are expreſsly mentioned; and as it is not declared in any part of the act that the rectories of the ſeveral pariſhes in queſtion ſhall be united they muſt ſtill be conſidered as three ſeparate rectories.

1801.
Wilson
v.
Van Mildert.

If the argument uſed for the Plaintiff were ſound, it would follow that a rectory and a vicarage in two pariſhes united by the act, would alſo be united, and that the latter would be ſwallowed up by the former; but it is clear from the caſe of *Reynoldſon* v. *Blake*, that if there be a rectory in one of the two pariſhes united under the act and only a vicarage in the other, that the rectory and vicarage continue diſtinct notwithſtanding the union of the pariſhes. The ſtatute 4 *W. & M. c.* 12. plainly ſhews, that pariſhes after the union of the churches remain diſtinct, except for the purpoſes ſpecified in the act of union; ſince if they were united, to all intents that act which obliges all the pariſhes to contribute to the repairs of the church would not have been neceſſary. So in the Building Act 14 *Geo.* 3. *c.* 78. *ſ.* 79. it is expreſsly declared, that whereas ſeveral pariſhes were united together after the fire of *London* "any two or more of the ſaid pariſhes ſo united ſhall *for the purpoſe of this act* be deemed one pariſh only." The letters of inſtitution afford ſtrong evidence of the ſenſe which has been put upon the ſtatute of *Car.* 2.

Cur adv. vult.

On this day the judgment of the Court (preſent Rooke and Chambre Juſtices) was delivered by

Heath J.—The queſtion is, Whether the Plaintiff in his declaration has well deſcribed the Defendant's benefice in reſpect of which he has ſued him for non-reſidence? In all the counts in this declaration the benefice is ſtated to conſiſt of one rectory. It is contended by the Defendant, that it conſiſts of three rectories united together, and which notwithſtanding their union ſtill exiſt. The union of theſe pariſhes is by the ſtatute 22 *Car.* 2. whereby it was enacted, that the pariſh church of *St. Mary le Bow* ſhould be alone rebuilt and ſhould be the pariſh church of the pariſhes ſo united. By ſection 68. it is provided, that the preſentation ſhall be to that church only which is to be rebuilt. It appears in evidence that the Defendant was admitted to the pariſh church of *St. Mary le Bow*, with the churches of *St. Pancras* and *Alhallows* thereunto annexed. The Defendant's counſel have greatly relied on the terms of this inſtitution and admiſſion to prove their point. In my apprehenſion the deſcription of the Defendant's benefice is ſubſtantially the ſame in the counts of the declaration as in the inſtitution and admiſſion. The word "annexed" is ſynonimous with united. In *Raſtall's Entries*, *fol.* 522 (*a*). we

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(*a*) Tit. *Quare Impedit*, *pl.* 6. In the edition of 1566 this entry is to be found *fol.* 479. *b.*

find

find theſe words, *Idem* J. B. *prætextu unionis annexationis incorporationis et conſolidationis ſolus perſona prædictæ integre eccleſiæ tunc extitit.* We muſt conſider the operation of law on the union: true it is, that there are ſtill three diſtinct patrons but there is one incumbent. By the union the patronage is preſerved, but the incumbency of two of the benefices is deſtroyed; it is the incumbency and not the rectory which is the ſubject of the ſuit, and if that be well deſcribed the Plaintiff may maintain his action. What is ſaid by *Powell* J. in *Ld. Raym.* 196. is material, *viz.* that in caſe of united churches, there is but one advowſon in right, and that every patron has the whole advowſon in his turn. Conſequently there is but one rector and one rectory: if theſe were three diſtinct rectories the incumbent could not hold them even with diſpenſation. It is material to conſider the pleadings in the caſe of union. In 11 *H.* 6. 33. the law is laid down by *Babbington* Ch. J. If a conſolidation be made of two churches and an abbot hath an annuity out of the church conſolidated to another, if the annuity be in arrear and the abbot brings his writ of annuity, he muſt name the parſon of the church to which the church is conſolidated. In the caſe of *Reynoldſon* v. *Blake* and *The Biſhop of London*, the Plaintiff brought *Quare impedit* for hindering him from preſenting to the church of *St. Andrew's Wardrobe* in *London* only, and in his declaration he ſtates the union of that church with the church of *St. Anne Blackfriars*, and he claims to preſent as patron of *St. Anne Blackfriars.* The pleadings are in *Levinz Entries* 141; and that was a union of a vicarage and a rectory, and the preſentation though in right of the vicarage was only to the church. The preſentations to theſe united churches have been the ſame as in the preſent inſtance, as appears by the caſe cited from 3 *Wilſon* 214. From theſe inſtances it may be inferred, that the preſentation in caſe of union may be either way, and that this is a proper deſcription. Much reliance has been had on the 68th ſection of the act, which reſerves to the ſeveral pariſhes their diſtinct rights. Nothing can be inferred from thence in reſpect to the incumbency. It was a cautious proviſo, perhaps neceſſary, becauſe the act unites the pariſhes, whereas at common law the churches only could be united. The ſtatute of 4 *W.* & *M.* relates only to churches united by the 17 *Car.* 2., as appears by the preamble.

Per Curiam, Rule diſcharged.

1801.

April 29th.

Cox and Others, Aſſignees of Emmott a Bankrupt, *v.* Morgan.

Payment to a creditor under an arreſt after a ſecret act of bankruptcy is protected by 19 *G.* 3. *c.* 32.

THIS was an action for money had and received to the uſe of the Plaintiffs. The general iſſue was pleaded, and the cauſe came on to be tried before Lord *Eldon* Ch. J. at the Guildhall Sittings in laſt *Hilary* Term, when a verdict was found for the Plaintiffs for 45*l.* 18*s.* 9*d.* ſubject to the opinion of the Court on the following caſe;—

The bankruptcy of *John Emmott* was proved, and the aſſignment to the Plaintiffs. The commiſſion was dated the 14th *Auguſt* 1799. The act of bankruptcy was the lying in priſon hereafter ſtated. *Emmott* was arreſted at the ſuit of one *Dixon* on the 31ſt *October* 1798, and committed to the *Fleet* on that arreſt on the 6th *November*. He remained in the *Fleet* on that account till the 16th *February* 1799, when he was diſcharged. *Emmott* had a partner named *Bray* who was abroad before he went to the *Fleet;* the partnerſhip was indebted to *Morgan* the Defendant in the ſum of 44*l.* 13*s.* 9*d.* on a bill of exchange accepted by *Emmott* and *Bray*, on the partnerſhip account. The bill not being paid *Morgan* proceeded by original againſt *Emmott* and *Bray*, for the purpoſe of outlawing *Bray*, on the 14th *November* 1798, and employed a ſheriff's officer to arreſt *Emmott*, who could not find him. An *alias* was taken out, and the ſheriff's officer went to his houſe and was told he was in the country. He afterwards met with him at his houſe and arreſted him at the ſuit of *Morgan*, on 23d *February* 1799. He told the officer he was juſt returned from *Portſmouth*. *Emmott* immediately paid *Morgan*'s attorney the 44*l.* 13*s.* 9*d.* and 1*l.* 5*s.* for intereſt which was paid over to *Morgan*. Neither *Morgan* nor any one concerned for him perſonally knew that *Emmott* had been in the *Fleet*, had committed an act of bankruptcy or that he was in inſolvent circumſtances.

The queſtion for the opinion of the Court was, Whether the Plaintiffs were entitled to recover? If the Court ſhould be of that opinion the verdict to ſtand; if not, a verdict to be entered for the Defendant.

Runnington Serjt. for the Plaintiffs. The queſtion ariſing upon this caſe for the conſideration of the Court, is Whether the payment to the Defendant of the 44*l.* 13*s.* 9*d.* is a payment protected by 19 *Geo.* 2. *c.* 32.? That act provides, "that no creditor in reſpect of goods ſold to the bankrupt or bills of exchange drawn, negociated or accepted by the bankrupt *in the uſual and ordinary courſe of trade and dealing*, ſhall be liable to refund to the aſſignees any money, which before the ſuing forth of the commiſſion was really and *bona fide*, and *in the uſual and ordinary courſe of trade and dealing* received by ſuch perſon before notice of the bankruptcy or inſolvency." It is contended, that the payment in this caſe was a payment within the terms of the act. It is admitted indeed, that the Defendant had no notice of the act of bankruptcy, but it remains to be conſidered whether this payment was in the uſual and ordinary courſe of trade and dealing? It may be difficult perhaps to define the preciſe meaning of thoſe words, but it is hardly poſſible to contend that a payment made in conſequence of an arreſt, is a payment in the uſual and ordinary courſe of trade and dealing. Is it uſual or ordinary for a merchant to refuſe to pay his juſt debts unleſs compelled by law? The Court will rather confine the terms uſed in the Act of Parliament to a caſe in which the party paying has the free exerciſe of his diſcretion whether he ſhall pay or not. Indeed the very act of ſuing out a writ againſt a party puts an end to the uſual and ordinary courſe of dealing. It is clear that unleſs the caſe come preciſely within the terms of the act, the Court will not protect the payment: for in *Vernon* v. *Hall*, 2 *T. R.* 648. a payment by the drawee of a bill of exchange received from a third perſon for the ſale of an eſtate, the drawee having become bankrupt without the knowledge of the holder, was held not to be protected, becauſe the holder had given time to the drawee. The caſe *ex parte Congleton*, 3 *Bro. Chan. Caſ.* 47. is to the ſame effect. It is true that previous to the caſe of *Vernon* v. *Hall* it was held in *Calvert* v. *Lingard*, ſittings *coram* Lord *Loughborough* 1783, cited in 5 *T. R.* 200. and 2 *H. Bl.* 335. that payment under an arreſt was within the Statute. The ſame was alſo decided in *Holmes* v. *Wennington* (*a*), *Trin.* 30 *Geo.* 3. in the

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(*a*) *Holmes* v. *Wennington*. In the Exchequer, *Trin.* 30 *Geo.* 3.

This was an action brought to recover back money paid by a trader after a ſecret act of bankruptcy to his creditor, who had arreſted him for the money; the debt having been contracted in the courſe of trade, the payment having been made a few days after the arreſt and in conſequence thereof, and whilſt he was under the bankrupt confinement. The queſtion at the trial was, whether this was a payment in the courſe of trade and protected by the ſtatute 19 *Geo.* 2. *c.* 32. *ſ.* 1.? *Eyre* Chief Baron on the trial was of opinion, that the payment was protected by that ſtatute.

the Court of *Exchequer*. With reſpect to the firſt of thoſe caſes it appears to be only a *Niſi Prius* deciſion, and there is no report of the

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Wood for the Plaintiff. Had it been meant that any *bonâ fide* payment ſhould come within the ſtatute, the ſtatute would have ſo expreſſed it: but there muſt be more than a *bonâ fide* payment; the payment muſt be in the uſual courſe of trade and dealing. Can it be ſaid that a payment by a man under *dureſs* is a payment in the courſe of trade? The preamble of the ſtatute is the beſt expoſition of what is a payment in the courſe of trade; that ſhews what the ſtatute means by ſuch a payment. Payment under *dureſs* of impriſonment, as ſuffering himſelf to be arreſted, to have executions againſt him, &c. is not in the uſual courſe of trade; it is an interruption at leaſt of his trade, if not a total ſtoppage of it. Both *dureſs* of impriſonment and *dureſs* of goods ſhew inſolvency. The payment muſt not only be *bona fide* but in the uſual courſe of trade. It is not neceſſary he ſhould be inſolvent with reſpect to every body; arreſt or execution either in body or goods preceding payment ſhews inſolvency to the party ſuing at leaſt; and that the payment is not in the uſual courſe of trade. Payment in the uſual courſe of trade is when bills are duly paid and honoured without driving a party to arreſt, on failure of payment. As to the caſe of *Vernon* and others aſſignees of *Tyler* v. *Hankey*, 2 *Term Rep.* 113. there was a pretty ſtrong notice of the act of bankruptcy. With reſpect to *Foſter* v. *Allenſon*, 2 *Term Rep.* 479. in that caſe no commiſſion iſſued.

Manley on the ſame ſide. Payment, and in the uſual and ordinary courſe of trade and dealing, are both requiſite. *Vernon* v. *Hall*, 2 *Term Rep.* 648. goes to ſhew both requiſite, becauſe there the payment was *bona fide* and would have been good if in the courſe of trade, which the Court held it was not. In the caſe of *Calvert* v. *Lingard*, Lord *Loughborough* does not in ſumming up at all mention or advert to the uſual courſe of trade and dealing. There is no deciſion ſince the act, that an arreſt ſhall protect a payment ſubſequent to an act of bankruptcy; but it is clear that if followed up by a commiſſion and aſſignment it has relation to the bankruptcy and avoids the payment and all *meſne* acts, 1 *Salk.* 111. The caſe of *Billon* v. *Hyde* and *Mitchell*, 1 *Atk.* 126. is deciſive to ſhew that the relation avoids payment, judgment, executions, and all legal acts, though Lord *Hardwicke* afterwards held that it appeared in that caſe that the bills were really paid in the uſual courſe of trade. The act of ſuing out the writ determined the uſual courſe of trade and dealing between the parties; and it may be difficult to define accurately what courſe of trade was in the meaning of legiſlature unleſs ſuch as ſubſiſts between merchant and merchant, *viz.* payment on the uſual credit given. In the caſe where payment has been upon an arreſt, the Court have pointedly laid hold of the circumſtance that the payment was before the act of bankruptcy. It is ſingular they ſhould lay hold of that, if after bankruptcy it would have been good.

Eyre Chief Baron. Thoſe caſes only decide what ſhall impeach, not what ſhall protect the aſſignment, but do not determine how payment after the act of bankruptcy ſhould be.

Manley. The Judges have often lamented that the Courts had not ſtuck more cloſely to the words of Acts of Parliament, particularly in the poor laws, and thought that if they had not brought caſes within them by way of analogy they would thereby have avoided great confuſion. Here the debt was contracted in the uſual courſe of trade and dealing, but the payment was after an arreſt, ſhall that protect him when the ſtatute does not? Caſe of *Vernon* and *Hall* is exactly like this, except that the preſent was a compulſory payment.

Eyre Chief Baron. I decided this at *Niſi Prius* with very great doubt—I thought that tying up the words "in the uſual courſe of trade and dealing" too cloſely would be very miſchievous to the public; but I found a difficulty in drawing a line to ſatisfy my own mind; I thought a payment on arreſt within it, and I did not then know of the caſe in the *Common Pleas*. What a debt contracted in the uſual courſe of trade and dealing is, is eaſy to be aſcertained; but as to payment in the courſe of trade and

1801.

Cox
v.
Morgan.

the caſe; and in the ſecond a reaſon is given which does not ſeem ſound, *viz.* that the party had uſed nothing but due diligence. But that reaſon is only applicable to caſes of payment before the act of bankruptcy, which always turn on the point of fraudulent preference; whereas in the caſe of a payment between the act of bankruptcy and the commiſſion, it is not only neceſſary that it ſhould be made *bona fide*, but that it ſhould be made by the bankrupt in the courſe of the trade. The caſes of *Bradley* v. *Clark*, 5 *T. R.* 197. and *Pinkerton* v. *Marſhall*, 2 *H. Bl.* 334. clearly ſhew that the 19 *Geo.* 2. *c.* 32. muſt be confined to the caſes therein expreſſed, and that any deviation from the uſual courſe of payment in the way of trade will prevent it from attaching.

Lens Serjt. *contra*. The circumſtance of this payment having been made by compulſion brings the caſe more fully within the meaning of the Statute than if it had been made voluntarily. The object of the ſtatute was to protect all *bona fide* payments to creditors in reſpect of goods ſold or bills drawn in the uſual courſe of trade. Now the debt in queſtion aroſe upon a bill of exchange drawn in the courſe of trade; and as the payment was obtained by

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and dealing it is difficult to draw the line. Mr. *Wood* defines it to be a payment according to the terms of the contract; but it would be very miſchievous to ſay that payments muſt be ſtrictly according to the terms of the contract or punctually made; for that would ſhake almoſt all the payment, in the city. Suppoſe a merchant ſays, call next week, caſh is low; and the creditor calls again and is paid, can any man doubt that it is a good payment? Suppoſe he calls two or three times? As to what is ſaid, that an arreſt ſhews inſolvency, that is a circumſtance in evidence from which a Jury may infer notice of it, but it is by no means deciſive, and it muſt be ſomething deciſive to mark the line. If it be not evidence of inſolvency, it is nothing but diligence to get his payment, and that ought not to defeat it. The other part of the act is more definite and more capable of being carried into execution. The inclination of my opinion without authorities was to have held it a good payment, and I ſhould have ſo determined, though with difficulty in my own mind; but I am glad to be relieved from that difficulty by an authority in point. I allude to the caſe in *Common Pleas*, and on talking with the Judges of that Court, I find they are of that opinion. In the caſe of *Vernon* and *Hall* the doubt was whether the nature of the debt was not changed, having become a loan and no longer a debt within the ſtatute. I acquieſce in the determination of the Court of *Common Pleas*, arreſts are now very frequent, not on the ground of inſolvency, but of quickening payments, which are within the ſtatute.

Hotham Baron. I am ſatisfied with the opinion of the Lord Chief Baron: though it be difficult to draw the line, yet it is clear that the ſtatute is a remedial law; it means to extend to payments made without improper motives on either ſide. I therefore think this payment is protected.

Perryn and Thompson Barons, were entirely of the ſame opinion.

Rule diſcharged without coſts.

1801.

Cox
v.
Morgan.

compulſion it proves that the payment was made *bona fide* and without colluſion between the parties. If there be no ſecret underſtanding between the parties, the payment muſt be conſidered as made in the courſe of trade: for it certainly is not contrary to the courſe of trade for a creditor to enforce payment of his debt by ſuch means as the law authorizes. As there have already been two deciſions upon this preciſe point the Court will not now ſet the queſtion afloat again. The caſe of *Calvert* v. *Lingard*, was not a mere *niſi prius* determination; for the opinion of Lord *Loughborough* was afterwards confirmed by the whole Court of *Common Pleas*, as appears from the words of Lord Chief Baron *Eyre* in *Holmes* v. *Wennington*. This laſt caſe was much agitated in the *Exchequer*, and Mr. Baron *Hotham* in giving his opinion ſaid, "Though it be difficult to draw a line, yet it is clear that the ſtatute is a remedial law, and means a payment without improper motive on either ſide."

Cockell Serjt. *amicus curiæ* ſaid, that he recollected a caſe before Mr. Juſtice *Buller* where a party having committed an act of bankruptcy which was unknown to a creditor, the latter obtained payment of his debt by arreſt, the aſſignees brought an action to recover the amount, and the learned judge held that the payment was protected.

Cur. adv. vult.

On this day the learned judges, not being unanimous, delivered their opinions *ſeriatim*.

Chambre J.—This is an action for money had and received by the Defendants for the uſe of the Plaintiffs in their character of aſſignees of the bankrupt. The matter comes before the Court upon a ſpecial caſe, reſerved on the trial of the cauſe before Lord *Eldon* at Guildhall, and the only queſtion that has been argued (and as it ſeems to me the only queſtion that can be made) is, whether the payment of the money for which the action is brought, and which was made by the bankrupt to the Defendant after an act of bankruptcy and under the circumſtances ſtated in the caſe, is a payment protected by the ſtatute 19 *Geo.* 2. *c.* 32. *ſ.* 1. or not? The circumſtances under which the payment was made are theſe—that the bankrupt was arreſted at the ſuit of a creditor on 31ſt *October* 1798, was committed to the *Fleet* the 6th *November*, and continued in Priſon under that arreſt till the 16th *February* 1799, when he was diſcharged. He had a partner named *Bray* who went abroad before the bankrupt went to the *Fleet*, and they became indebted to the Defendant by the acceptance of a bill of exchange on their partnerſhip account. While the bankrupt was in priſon, on the 14th *November* 1798, the Defendant ſued out an original againſt the bankrupt and *Bray*, meaning to out-law *Bray*. The officer could not find the bankrupt to arreſt him. An *alias* was ſued out; the officer was told at his houſe he was out of town, but on the 23d *February*, (7 days after his diſcharge,) the officer met him and arreſted him, and was told by him he was juſt returned from *Portſmouth*; upon that arreſt he paid the debt to the preſent Defendant's attorney. The Defendant had no knowledge of his impriſonment, his bankruptcy, or inſolvency. Under theſe circumſtances I am of opinion, that the payment is not protected by the ſtatute. I ſhould have given this opinion with much more ſatisfaction to myſelf if it had been fortified by thoſe of the reſt of the Court; but I ſtand ſingle in my opinion here, both my Brothers thinking differently from me upon the ſubject, and I am alſo oppoſed by the authority of a determination of the Court of *Exchequer*, which (though there are material circumſtances in the preſent caſe which did not occur in that) is a caſe in point as to the general queſtion of a payment under an arreſt being protected by the ſtatute. That deciſion too is ſtrengthened by and in a conſiderable degree, founded upon a determination of Lord *Loughborough* at *Niſi Prius*, which I learn from my Brother *Heath* was confirmed in this Court. I find from ſome notes I have procured of what was ſaid by the Court at *Niſi Prius*, that a writ in that caſe had been ſued out, but whether the party was arreſted I do not know. I ſuppoſe he was. I am ſenſible of the weight of theſe authorities and of the reſpect that is due to them, though there are diſtinguiſhing circumſtances in the preſent caſe, but if it was right to extend the act ſo far as is done in thoſe caſes I do not know what diſtinction is to be relied on; I feel myſelf therefore under the neceſſity of inquiring into the foundation of thoſe deciſions. I do it with the utmoſt diſtruſt of my own judgment, but if I find no ambiguity in the act, and think (however erroneouſly) that the act has not been expounded but contradicted, I feel it my duty to adhere to the authority of the ſtatute.

1801.
Cox
v.
Morgan.

Before the paſſing of this act I take the law to have been clearly ſettled, and ſo the act itſelf ſuppoſes, that when an act of bankruptcy had been committed and a commiſſion iſſued in conſequence of it, the property of the bankrupt was by relation ſo veſted in the aſſignees, that any diſpoſition of it by the bankrupt after the act of bankruptcy was void as againſt the creditors, however fairly ſuch diſpoſition was made, and without any regard to its being a voluntary or compulſory payment. Payments to a bankrupt ſtand upon a very different footing; and with reaſon. Even after notice of the act of bankruptcy the payment may be good if made under legal compulſion, for an act of bankruptcy is no defence againſt the action of the perſon who commits it unleſs a commiſſion is taken out againſt him, and it is not the fault of the bankrupt's debtor if the delay of the creditors in ſuing out the commiſſion deprives him of his defence; he ought not to increaſe the fund by paying his debt twice over. But compulſion againſt the bankrupt, however it may operate in protecting payments before the act of bankruptcy while the property is in the bankrupt himſelf (and which it does by excluding the imputation of fraud) can have no effect in protecting payments after the act of bankruptcy. The bankrupt himſelf does not ſuffer by the compulſion, and the compelling creditor has only to refuſe what he ought not to have taken, and come in for his ſhare in common with the other creditors. The queſtion therefore muſt turn upon the operation of the ſtatute, and we are only to ſee whether the payment on which the preſent queſtion ariſes is there deſcribed. The recital of the ſtatute is not immaterial, it ſtates the frequent commiſſion of ſecret acts of bankruptcy unknown to creditors and others with whom the bankrupts have dealings in trade, and their continuing afterwards to appear publickly and carry on their trade and dealing by buying and ſelling, drawing, accepting, and negotiating bills, and paying and receiving money on account thereof in the uſual way of trade, and in the ſame open and public manner as if they were ſolvent perſons. It then recites the diſcouragement to trade and prejudice to credit, from permitting payments to be defeated in the caſes and under the circumſtances above-mentioned, and enacts that no perſon who is or ſhall be really and *bonâ fide* a creditor of any bankrupt for or in reſpect of goods really and *bonâ fide* ſold to ſuch bankrupt, or for or in reſpect of any bill or bills of exchange really and *bonâ fide* drawn, negotiated or accepted by ſuch bankrupt in the uſual and ordinary courſe of trade and dealing ſhall be liable to refund or repay to the aſſignee or aſſignees of ſuch bankrupt eſtate, any money which before the ſuing forth ſuch commiſſion was really and *bonâ fide*, and in the uſual and ordinary courſe of trade and dealing received by ſuch perſon of any ſuch bankrupt before ſuch time as the perſon receiving the ſame ſhall know, underſtand or have notice that he is become a bankrupt, and that he is in inſolvent circumſtances. The nature of the debt in the caſe before the Court is not denied to be ſuch as the ſtatute deſcribes, but is the mode of payment ſuch as the ſtatute requires? The debt has been really paid. It is ſtated (and ſo we muſt take the fact to be, though I think the circumſtances would have warranted a contrary concluſion) to have been paid without the Defendant's knowledge of bankruptcy or inſolvency; but that is not all that the ſtatute requires. It is further required, to be the uſual and ordinary courſe of trade and dealing, and on thoſe words the queſtion, or at leaſt my difficulty ariſes. I have endeavoured to obtain an account of the two authorities wherein a payment under an arreſt has been held to be protected, and to my great diſappointment I find little or no argument applied to the very important words I have laſt alluded to, but a good deal to a circumſtance on which the ſtatute is totally ſilent, namely, a compulſive payment, which was undoubtedly bad before the act. In the caſe at *Niſi Prius* the queſtion is conſidered as a queſtion of notice of inſolvency, and what is preſumptive evidence of ſuch notice, or of colluſive payments and preferences. It is ſaid, that a knowledge of the debtor's being poor or in failing circumſtances would not vitiate the payment, and that compulſive payments were meant by the act to be protected. They are protected before the act of bankruptcy, but the Act of Parliament I think has no view whatever to compulſive payments either before or ſubſequent to the act of bankruptcy. The argument of the Court of *Exchequer*, though expreſſing great doubts on the ſubject, diſpoſes of the language of the act on which the queſtion ariſes in a way that would ſolve every difficulty in every caſe, it cuts the knot at once. It is ſaid to be eaſy to aſcertain what is a debt contracted in the courſe of trade, and therefore the deciſion in *Vernon* and *Hall* is approved of, but as to payments in the uſual and ordinary courſe of trade and dealing, it is ſaid to be difficult to draw the line. Then an innacurate definition of ſuch payments ſuppoſed to have been uſed in argument

1801.
Cox
v.
Morgan.

ment by the counſel is controverted, and we hear no more of thoſe words or of any conſtruction of them, they are in effect expunged from the ſtatute, and what follows amounts only to this, that the circumſtance of an arreſt can only be uſed as evidence to be left to a jury, of notice of inſolvency, and that if not evidence of ſuch notice it is nothing but diligence to get payment, a means to quicken the payment which ought not to defeat it, and that it is ſufficient that there is no improper motive on either ſide. As to the difficulty of defining what are payments in the uſual and ordinary courſe of trade and dealing, without feeling much of that difficulty it may be ſufficient for me to ſay, that it is not neceſſary in deciding one caſe upon an Act of Parliament to decide all the caſes that may poſſibly happen, and that if in the caſe before us, we can ſay, that the payment was not in the uſual and ordinary courſe of trade and dealing, we have no occaſion to go further; I have no difficulty in ſaying, that I admit that diligence in procuring payment of a debt uſed in the common and ordinary way would not of itſelf defeat a payment; I have as little difficulty in ſaying, that it is no part of the purview of the act to afford particular protection to diligence or activity in recovering debts; on the contrary the intention is manifeſtly to protect only thoſe who are deluded by ſpecious appearances of ſolvency and credit; and though it be true that improper motives or knowledge of inſolvency may vitiate payments otherwiſe good, yet purity of motives alone, without the concurrence of the other circumſtances required by the ſtatute will not give validity to ſuch payments made after the act of bankruptcy. The intention of the act is not generally to authoriſe creditors to retain what they had received without knowledge of inſolvency: it is to place creditors of a particular deſcription, and under particular circumſtances, in a better ſituation than the general maſs of creditors. That being the object of the act, it was neceſſary in order to prevent litigation and the extenſion of the act to perſons not intended to receive the benefit of this preference, to deſcribe with preciſion the condition of thoſe who were to have the preference; the legiſlature have done it with guarded attention, by uſing as definite and reſtrictive language as could well be found to anſwer that purpoſe. To prevent the effect of any ambiguity in the meaning of the word "uſual" they add the word "ordinary". The payment muſt not only be in that courſe of trade and dealing which is uſual, but it muſt be that which is in the ordinary uſe. The propriety of confining the act to its declared objects is diſtinctly ſtated by Lord *Kenyon*, in the caſe of *Bradly* v. *Clarke*, 5 *Term Rep.* He ſays "The legiſlature have choſen to uſe particular words and to confine the remedy to particular caſes. The ſtatute only extends to two caſes of which this is neither. Whether or not it would have been wiſe to have extended this proviſion to all caſes I will not preſume to determine, though I cannot refrain from obſerving, that had that been the caſe all the property of a bankrupt might be conveyed to one creditor to the excluſion of the reſt. In determining on this Act of Parliament it is ſufficient to ſay, that this caſe is not within the words, nor, as far as I can collect, the intention of the act; though had it clearly and indiſputably appeared to have come within the meaning of the act, I ſhould have been inclined to have extended it to this caſe." The caſe of *Vernon* and *Hall* (if caſes were neceſſary) appears to me a ſtrong authority that the act ought not to be extended in conſtruction. If it be ſaid that that caſe applies only to the nature of the debt which was held to be turned into a loan, I anſwer that the words of that part of the clauſe which deſcribes the nature of the debt as to the courſe of trade are exactly the ſame with thoſe which relate to the mode of payment; the debt there having been alſo contracted as deſcribed in the act, the deciſion may properly refer to the mode of payment; but whether it does or not the caſe proves that the act ceaſes to operate when circumſtances not referable to a trading are introduced. As a remedial act I am ready to give it every extenſion, by conſtruction, that remedial acts are entitled to; but no principle applying to the conſtruction of remedial acts authoriſes the extenſion of them contrary to the intention of the Legſlature. It may alſo be remarked, that all the other bankrupt laws are remedial; that this particular act trenches upon the great leading principle of the bankrupt laws, that of ſecuring the property for equal diſtribution, by giving a preference to a particular claſs of creditors; and therefore is not peculiarly entitled to have its operation extended by conſtruction. It is time to reſort to the facts of the caſe and ſee how far they anſwer the deſcription contained in the act. When the bankrupt had been publickly and openly carrying on his buſineſs we nowhere learn, we have no act of trading ſtated, but the acceptance of the bill as a partner with another perſon. After that he is arreſted for debt, goes to gaol and

1801.
Cox
v.
Morgan.

and lies there near four months. After that act of bankruptcy it is not in evidence that he ever appeared publickly and carried on his trade and dealing in the uſual way of trade, and in the ſame open and public manner as if he was a ſolvent perſon, all which circumſtances are by the preamble ſuppoſed to attach themſelves to the ſituation of the bankrupt, whoſe payments were meant to be ratified by this act; on the contrary, he was arreſted by the Defendant within a week after his diſcharge, having according to his own account gone off to *Portſmouth* in the meantime. Was the Defendant deluded by any ſpecious appearances of ſolvency at the time of the payment? He had ſued out an original againſt the two partners very ſoon after the bankrupt went to priſon. The other partner was gone out of the kingdom. The Defendant could not be found by the officer; an *alias* became neceſſary; he is met with accidentally, not having been found at his own houſe, and arreſted; to deliver himſelf from that arreſt he makes the payment. Can we ſay this is a payment made by a perſon carrying on his buſineſs as a ſolvent man, in an open and public manner, or which comes more directly to the enactment of the ſtatute, Was this a payment in the uſual and ordinary courſe of trade and dealing? Are ſheriffs' bailiffs the perſons who tranſact the affairs of merchants and traders in the ordinary courſe of trade and dealing? If this will do where are we to ſtop? This is a caſe where payment has been made under an arreſt, but why ſtop there? Will not the argument go equally to protect payments after ſuing out execution? If indeed the ſheriff ſeizes and ſells the effects, that may not be conſidered as a payment by the party, but I can find no difference between the preſent caſe, and caſes where the bankrupt pays the money to prevent the ſeizure, or to redeem the goods after ſeizure, or even to redeem his perſon after he is taken upon the *ca. ſa.*: and payments under all theſe circumſtances we are deſired to conſider, as made under appearances of perfect ſolvency on the part of the bankrupt, and in the ordinary courſe of trade. I feel the weight of the authorities againſt the opinion I am delivering, and I am fully aware of the propriety of adhering to former deciſions, and the miſchief of lightly departing from them, but I am in ſome degree relieved from their preſſure by theſe conſiderations, that the attainment of certainty is the chief reaſon for ſubmitting to the authority of ſuch determinations as are not perfectly ſatisfactory in reſpect of the arguments on which they were founded, and that in my view of the caſe before us, certainty will be better attained by bringing back our attention to the language and meaning of the Act of Parliament which is to be the rule of our conduct, than by following the determinations; to what uncertainty they lead we have an inſtance in the late attempt in the Court of *King's Bench*, to bring payments to carriers for the carriage of goods within the protection of the ſtatute, which I can only attribute to the great latitude of conſtruction uſed in the former caſes. On theſe grounds I feel myſelf bound to give my opinion, that the payment in queſtion is not ſupported by 19 *Geo.* 2., and that the Plaintiffs the aſſignees are entitled to recover.

ROOKE J.—In this caſe, a bill drawn *bonâ fide* and in the ordinary courſe of trade has been paid after an act of bankruptcy, immediately upon the bankrupt's being arreſted, and neither the creditor nor any one concerned for him knew that the bankrupt had committed an act of bankruptcy or was in inſolvent circumſtances. The queſtion is, whether this payment being immediately upon an arreſt is a payment in the ordinary courſe of dealing? or whether being a payment by legal compulſion, it is not out of ſuch ordinary courſe? In deciding this queſtion I think I ought to look to the effect of uſing legal diligence in other caſes reſpecting bankruptcy, and to ſee in what light courts of law have conſidered it. The ſtatute 1 *Jac.* 1. *c.* 15. *ſ.* 14. provides "that no debtor of a bankrupt be hereby endangered for the payment of his debt truly and *bonâ fide* to any bankrupt before ſuch time as he ſhall underſtand or know that he is become bankrupt." The ſtrict conſtruction of this ſtatute would be, that if he did underſtand or know it, his payment ſhould be endangered: but courts of law have held, that if a creditor has notice of a bankruptcy and pays under legal coercion he ſhall be protected. See 3 *Keble* 231. *Freeman* 349. S. C. 2 *Term Rep.* 479. Here then a payment by legal compulſion is ſupported, even againſt the obvious conſtruction of the ſtatute, and hence I conclude, that in caſes of bankruptcy payments by compulſion of law are favoured and protected. The words of the ſtatute 19 *Geo.* 2. are very different from thoſe of 1 *Jac.* 1.; but they do not expreſsly avoid payment by legal coercion, nor exclude them from protection: and if excluded, they muſt be excluded by implication only; and ſuch implication if applied to the whole clauſe on which this queſtion ariſes will go a great way indeed to invalidate *bonâ fide* payments to honeſt creditors. The ſtatute 19 *Geo.* 2. ſo far as reſpects bills, requires that they be drawn, negotiated, or accepted really and *bonâ fide*, and in the uſual and ordinary courſe of trade and dealing. Now if an arreſt ſo far changes the ordinary courſe of trade and dealing as to affect the payment of a bill, it will equally affect the drawing, the negotiating, or the accepting it. The conſequence will be, that if a debtor having committed a ſecret act of bankruptcy is arreſted and gives or accepts a bill payable at a future day, and actually pays it, and then a commiſſion iſſues, the aſſignees may recover back the money. This will be a very dangerous conſtruction and will render all tranſactions under arreſt very precarious. It has been ſuggeſted, that payment under arreſt is not to be favoured, becauſe the arreſt is a circumſtance which ſhould raiſe a ſuſpicion of inſolvency. If ſo, by the ſame reaſoning, payment under a threat of arreſt will be equally ſuſpicious; for whether a man pays before the bailiff arreſts him or after, if he pays under the terror of a gaol he pays under compulſion; and the compulſion in either caſe may with equal reaſon raiſe a ſuſpicion of inſolvency. If a threat to arreſt does not alter the nature of a payment and take it out of the ordinary courſe of dealing (and it has not been contended in argument that it does) it will be difficult to aſſign any ſound reaſon why an actual arreſt ſhould do ſo. There are ſtages in the proceedings between the threat and the actual arreſt which are as much out of the ordinary courſe of dealing as the arreſt itſelf; and what line ſhall we draw by our diſcretionary conſtruction where the Legiſlature has drawn none? Shall we enquire, Is the writ purchaſed? Is it delivered to the bailiff? Is the bailiff in the houſe? Has he ſeized the debtor? or, Is he only in the act of doing it? When is it that the ordinary courſe ceaſes and the extraordinary begins? As the words "uſual and ordinary courſe of trade and dealing" do not neceſſarily exclude tranſactions either by menace or by compulſion of legal proceſs, I am not diſpoſed to extend them to either caſe; they are general words and they may be intended to apply to the caſe of undue preference: for a man may be diſpoſed to pay a debt really and *bonâ fide* due from a deſire to favour a particular creditor, and may go out of the ordinary courſe of trade and dealing to do ſo. Payments under legal compulſion having been favourably conſidered by our Courts in the conſtruction of 1 *Jac.* 1. I think they ought to be as favourably conſidered in the conſtruction of 19 *Geo.* 2. which is in *pari materiâ*. Legal coercion is a courſe which the law allows, and ſurely if we attend to the literal conſtruction of the ſtatute, it is neither unuſual nor extraordinary nor out of the ordinary courſe of dealing for a creditor to be driven to arreſt his debtor, or to uſe legal diligence in order to procure payment. The taking out legal proceſs does not depend ſo much on the real credit of the debtor as on the patience or impatience of the creditor. If a creditor is obliged to call three or four times on a debtor before he can obtain payment it may awaken ſuſpicion. If a patient creditor does this and receives payment, he is protected. Shall we ſay that if a harſh creditor calls once, and then arreſts and is paid, he ſhall refund? Shall we conſider his ſeverity as a proof of his debtor's inſolvency? The ſtatute has given one poſitive criterion, *viz.* knowledge of the bankruptcy or inſolvency; and has alſo required that the tranſaction ſhall be in the ordinary courſe of trade and dealing; but as it has not defined what that ordinary courſe muſt be, the courts of law muſt, as caſes ariſe, declare what is within the ordinary courſe and what is not. I have now given my reaſon, why upon general principles I think that arreſt or legal diligence is not within the reſtriction of the ſtatute: but if it were a doubtful point how the ſtatute ſhould be conſtrued, I muſt conſider myſelf as bound by the conſtruction it has already received in two Courts in *Weſtminſter-hall.* The caſe of *The Aſſignees of Jones* v. *Lingard* was tried before Lord *Loughborough*, and afterwards was heard in this Court on a motion for a new trial. There the creditor brought an officer with the writ into the ſhop, and then the debt was paid, and the payment was held to be good. The caſe of *Holmes* v. *Wennington* was decided on ſolemn argument in the Court of *Exchequer.* Theſe caſes have been cited in the Court of *King's Bench*, in the caſe of *Bradley* v. *Clarke. Paſch.* 1793. 5 *Term Rep.* 200. and no doubt was hinted in that court as to the propriety of the deciſions; yet Lord *Kenyon* particularly notes, how right it is to adhere to the words of the ſtatute. We are alſo informed, that the late Mr. Juſtice *Buller* ruled the ſame point on the Northern Circuit, and that no application was made for a new trial. For theſe reaſons I think the verdict ſhould be entered for the Defendant.

Heath J.—The queſtion is whether a payment to a tradeſman who has committed a ſecret act of bankruptcy, to a creditor who has arreſted him, and who has no knowledge of the act of bankruptcy or of the inſolvency of his debtor, be good within the ſtatute of 19 *Geo.* 2.?

1801.

Cox
v.
MORGAN.

Before that ſtatute, it was the policy of the bankrupt laws in all caſes to deprive the bankrupt, by relation to his act of bankruptcy, of the power of diſpoſing of his effects. In order to avoid the inconveniencies ariſing from too rigid an obſervance of this principle, the act in queſtion was made. It has always been conſidered as a remedial ſtatute, and as ſuch is entitled to a liberal conſtruction. In order to give validity to the payment of a bill of exchange, it muſt be drawn and the money received in the ordinary courſe of trade. In my apprehenſion this bill had both requiſites. Of the conſideration of the bill there is no queſtion. The bill was due before it was paid, and it was not officiouſly paid by the bankrupt. The objection is, that the payment was made under the terror of an arreſt. If the bill had been paid before it became due, or if the bankrupt had ſolicited the Defendant to receive the money, thoſe circumſtances would have vitiated the tranſaction, and would have brought the caſe within the ſtatute. It is objected that the payment is under an arreſt. If this were to be the ground of the deciſion it would introduce great uncertainty. For if an arreſt will vitiate a payment, why not a menace, and if a menace, why not a promiſe of ſome collateral advantage. There are two principles on which I ſhall found my judgment. The firſt is the general policy of the law, that the uſing of legal diligence is always favoured and ſhall never turn to the diſadvantage of the creditor. The maxim *vigilantibus et non dormientibus ſuccurrunt jura* is one of thoſe that we learn on our earlieſt attendance in *Weſtminſter Hall*. The ſecond principle is, that this ſtatute ſhall receive a conſtruction agreeable to the general policy of the bankrupt laws, namely, that it ſhall not be in the power of the bankrupt to diſpoſe of his effects after his bankruptcy in ſuch a way as to give a preference to a favourite creditor. Now if payment under an arreſt, though otherwiſe in a due courſe of trade, were to be held bad, the conſequence might be, that if in the ſame day, or at the ſame inſtant, two creditors ſhould apply for payment of their reſpective demands, the bankrupt might make a good voluntary payment to one creditor, and refuſe payment to the other till there had been ſome menace or actual arreſt made to vitiate the payment. I can ſee no inconvenience from this conſtruction. If it be ſaid, that the creditors under an arreſt might ſweep away all the effects of the bankrupt; ſo may the favoured creditor under a voluntary payment; and the latter miſchief is the moſt to be apprehended. Therefore I am of opinion, as well upon the general policy of the law that favours the legal diligence of creditors, as on the particular policy of the bankrupt laws, that this is a good payment and protected by the ſtatute of 19 *Geo.* 2. If the caſe were doubtful, the deciſions ought to put an end to the controverſy. I allude to the caſes of *Calvert* and *Lingard* in this Court, and of *Holmes* v. *Wennington.* I cannot paſs over in ſilence the opinion and deciſion of the late Mr. Juſtice *Buller*, whoſe judgment will always have the greateſt weight with me. The queſtion is whether this be a doubtful caſe? A caſe may not be the leſs doubtful becauſe I entertain no doubt on the ſubject; but that is doubtful concerning which learned men differ. For theſe reaſons I am of opinion, that the Plaintiff is not entitled to recover, and that a verdict ſhould be entered for the Defendant.

Verdict to be entered for the Defendant.

(IN THE EXCHEQUER CHAMBER.)

Hill Gent. one, &c. *v.* Halford and Another; in Error.

April 29th.

A note promiſing to pay "on the ſale or produce, immediately when ſold, of the *White Hart, St. Albans, Herts*, and the goods, &c. value received," cannot be declared upon as a promiſſory note within the ſtatute, though it be averred, that before the action commenced the *White Hart* and the goods were ſold.

Error from a judgment of the Court of *King's Bench* in an action by the payee againſt the maker of a promiſſory note. The firſt count of the declaration ſtated that, "the Plaintiff in error made and ſigned his certain note in writing, commonly called a promiſſory note bearing date &c. and thereby promiſed to pay to the Defendants in error by the names and deſcription of &c. the ſum of 190*l.* on the ſale or produce, immediately when ſold, of the *White Hart*, *St. Albans*, *Herts*, and the goods, &c. (meaning a certain meſſuage or dwelling-houſe called the *White Hart*, ſituate at *St. Albans*, in the county of *Herts*, and certain goods being therein) value received, and then and there delivered the ſaid note to the Defendants in error;" after alleging the liability of the Plaintiff in error to pay, and his promiſe as uſual, the declaration averred, "that afterwards and before the exhibition of the bill of them the Defendants in error, to wit on, &c. at, &c. the ſaid meſſuage or dwelling-houſe called the *White Hart*, and the goods in the ſaid note ſpecified were ſold, whereby the ſaid ſum of money in the ſaid note ſpecified became and was forthwith and immediately due and payable according to the form and effect of the ſaid note, whereof the Plaintiff in error then and there had notice." There were other ſpecial counts, and alſo the common money counts and concluſion. On this declaration judgment having gone by default, a writ of inquiry was executed, and the Defendants in error recovered general damages.

The cauſes now aſſigned for error were, "that by the record aforeſaid it appears, that damages have been aſſeſſed for and adjudged to the Defendants in error, upon the whole of their ſaid declaration generally; whereas it appears in and by the record aforeſaid, that the firſt count of the ſaid declaration was and is inſufficient in law, and that no damages could or ought by law to have been aſſeſſed or adjudged to the ſaid Defendants in error in reſpect thereof, or of the ſuppoſed promiſe and undertaking therein mentioned."

Lawes for the Plaintiffs in error contended, that the note on which the firſt count of the declaration was founded could not be ſuſtained as a promiſſory note, inaſmuch as the payment thereof was made to depend upon a contingency which might never happen, *viz.* the ſale of the *White Hart Inn*, the title to which might be ſo bad, that no purchaſer would be found. He cited *Dawkes* v. *Lord Deloraine*, 2 *Bl.* 782. 3 *Wilſ.* 207. S. C. and *Carlos* v. *Fancourt*, 5 *Term Rep.* 482.

Wigley contrà. In thoſe caſes in which it has been diſcuſſed whether a note payable upon a contingency were a promiſſory note within the ſtatute, the queſtion has principally turned upon the point whether the note in queſtion were negotiable or not; the neceſſity of which may perhaps be doubtful. With reſpect to *Carlos* v. *Fancourt* it appears, that in that caſe there were other objections to the Plaintiff's recovery; for though the note was made payable "out of the Defendant's money which ſhould ariſe from his reverſion of 43*l.* when ſold," it was not, as in this caſe, averred that the reverſion had been ſold; and that circumſtance was obſerved upon by Mr. Juſtice *Groſe* in his judgment. If ever there was a note depending upon a contingency, it was that which in the caſe of *Andrews* v. *Franklin*, 1 *Str.* 24. was held to be a good note. There the contingency was, after a certain ſhip ſhould be paid off; now if it were a private ſhip no wages could have been earned unleſs the ſhip arrived; and if it were a public ſhip the

1801.
HILL
v.
HALFORD.

wages might have been loſt by deſertion. In *Evans* v. *Underwood*, 1 *Wilſ.* 262. a note payable upon the like contingency to the former was held good: and in *Julian* v. *Shobrook*, 2 *Wilſ.* 9. the Defendant having accepted a bill payable when in caſh for the cargo of the ſhip *Thetis* was held liable on the bill notwithſtanding a motion in arreſt of judgment on the ground of its being a conditional acceptance. Now if there be any ſimilarity between the ſituation of parties to bills of exchange and promiſſory notes, it is between the ſituation of the acceptor of a bill of exchange and the maker of a promiſſory note. With reſpect to *Dawkes* v. *Lord Deloraine*, that was the caſe of a bill of exchange payable out of a particular fund, whereas the note in the preſent caſe is not payable out of a particular fund, but only at a particular time, which time is alleged in the declaration to have arrived. Suppoſing however, that this note is not negotiable, yet it ſeems from the words of 3 & 4 *Ann. c.* 9. *ſ.* 1. that an action may be maintained upon it, for the former part of the ſection enacts, that where promiſſory notes are made payable to any perſon or perſons, his or their order, or unto bearer, the ſums mentioned in ſuch notes ſhall be payable to ſuch perſon or perſons, without any reference to their negotiability: but the enſuing part of the ſame ſection only makes them aſſignable or indorſable over when drawn to any perſon or perſons, his, her, or their order. If therefore negotiability be of the eſſence of a note, and the words of the ſtatute are to be conſtrued ſtrictly, no man can declare upon a note which is not made payable to order. But it has been decided in *Burchell* v. *Slocock*, 2 *Ld. Raym.* 1545. that a promiſſory note payable to *A. B.*, without adding either order or bearer, is a good note within the ſtatute; and that caſe has ſince been recognized in *Smith* v. *Kendall*, 6 *Term Rep.* 123. In this caſe the note in queſtion was drawn for value received on a promiſe to pay when the premiſes at *St. Albans* ſhould be ſold, and there is an averment in the declaration that the premiſes have been ſold.

The Court (*abſente* Lord ELDON Ch. J.) were clearly of opinion, that the note in queſtion could not be declared upon as a promiſſory note within the ſtatute.

Judgment reverſed.

May 4th.

Salkeld Gent. one, &c. *v.* Lands.

If a Defendant being arreſted upon proceſs in *K. B.* give a warrant of attorney to confeſs judgment; and be afterwards holden to bail in *C. B.* in an action upon that judgment the Court will diſcharge him upon a common appearance.

The Defendant in this caſe having been arreſted by proceſs out of the *King's Bench*, gave a warrant of attorney to confeſs judgment; on that judgment the preſent action was commenced, and the Defendant holden to bail. A rule *Niſi* having been obtained for diſcharging him on entering a common appearance,

Marſhall Serjt. ſhewed cauſe and contended, that the Defendant was well holden to bail, inaſmuch as no bail had ever been given on the former arreſt, and therefore the rule that bail could not be taken *in infinitum* did not apply here. He cited *Kendall* v. *Carey*, 2 *Bl.* 768. where a Defendant having given bail in error upon a judgment in the *King's Bench*, and afterwards holden to bail in this Court in an action of debt upon the ſame judgment, this Court refuſed to diſcharge him, *Gould* J. ſaying, "the reaſon of this practice is becauſe there has never been bail given in this Court."

Cockell Serjt. *contrà* inſiſted, that this was within the rule that no man ſhould be twice holden to bail for the ſame cauſe of action, and that the cuſtody was the ſame as in the former arreſt.

The Court (conſiſting of Heath, Rooke, and Chambre Js.) were of opinion, that the giving a warrant of attorney to confeſs judgment was tantamount to giving bail in the firſt action, and that the Defendant in this caſe, if held to bail again, would ſuffer preciſely the ſame vexation as in the common caſes to which the rule was allowed to extend.

Rule abſolute.

May 4th.

Robinson *v.* Dunmore.

If *A.* ſend goods by *B.* who ſays "I will warrant they ſhall go ſafe," *B.* is liable for any damage ſuſtained by the goods, notwithſtanding *A* ſend one of his own ſervants in *B.*'s cart to look after them.

Aſſumpſit. The declaration ſtated, that in conſideration that the Plaintiff, at the ſpecial inſtance and requeſt of the Defendant, would deliver to the Defendant divers goods and chattels (ſpecifying them) to be taken care of, and ſafely and ſecurely carried and conveyed by the Defendant in and by a certain cart of Defendant from *A.* to *B.* and there to wit, at *B.* to be ſafely and ſecurely delivered to one *J. S.* for certain hire and reward to the

Defendant in that behalf, the Defendant undertook and promiſed to take care of the ſaid goods and chattels, and ſafely and ſecurely to carry and convey the ſame in and by his ſaid cart from *A.* to *B.* and there to wit, at *B.* ſafely and ſecurely to deliver the ſame to the ſaid *J. S.*; that the Plaintiff did afterwards deliver the ſaid goods and chattels to the Defendant, to be carried, conveyed, and delivered as aforeſaid. And that although the Defendant had and received the ſaid goods and chattels for the purpoſe aforeſaid, yet he did not take care of the ſaid goods and chattels, or ſafely and ſecurely carry or convey the ſame in and by his ſaid cart or otherwiſe from *A.* to *B.*, nor there to wit, at *B.* ſafely and ſecurely deliver the ſame to the ſaid *J. S.*, but on the contrary ſo careleſsly conducted himſelf in and about the carriage and conveyance of the ſaid goods and chattels, that a great part of them, to wit, &c. through his negligence were wetted and damaged.

The Defendant pleaded *Non-aſſumpſit.*

The cauſe coming on to be tried before Lord *Eldon* Ch. J at the *Weſtminſter* Sittings after laſt *Hilary* Term, it appeared in evidence, that the Plaintiff who was an upholſterer, having occaſion to ſend ſome furniture into the country, agreed with one *Groves* a carman, to take the ſame for ten guineas, excluſive of tolls; that *Groves* thinking the diſtance too great, offered the Defendant who alſo kept a cart and horſe, the refuſal of the job, who agreed to undertake it and gave *Groves* half-a-guinea by way of gratuity; that the Plaintiff having acceded to the Defendant's offer to go inſtead of *Groves*, the Defendant brought his cart to the Plaintiff's houſe, where the goods were loaded in the preſence of the Plaintiff himſelf, and with the aſſiſtance of two of the Plaintiff's ſervants; that the Plaintiff having obſerved that the tarpaulin which the Defendant had brought for the purpoſe of covering the cart was too ſmall, the Defendant ſaid, "I have plenty of ſacks, and I will warrant the goods ſhall go ſafe." On account of the Defendant being a ſtranger to the Plaintiff, the latter ſent one of his own porters with the cart, who would otherwiſe have gone by the ſtage; that this porter in the courſe of the journey paid a perſon for watching the goods one night; and that the goods in the courſe of the journey were damaged by rain. A verdict was found for the Plaintiff under his Lordſhip's direction, with liberty for the Defendant to move that the verdict might be ſet aſide and a non-ſuit entered.

May 4th.

SALKELD Gent. one, &c. *v.* LANDS.

If a Defendant being arreſted upon proceſs in *K. B.* give a warrant of attorney to confeſs judgment; and be afterwards holden to bail in *C. B.* in an action upon that judgment the Court will diſcharge him upon a common appearance.

THE Defendant in this caſe having been arreſted by proceſs out of the *King's Bench*, gave a warrant of attorney to confeſs judgment; on that judgment the preſent action was commenced, and the Defendant holden to bail. A rule *Niſi* having been obtained for diſcharging him on entering a common appearance,

Marſhall Serjt. ſhewed cauſe and contended, that the Defendant was well holden to bail, inaſmuch as no bail had ever been given on the former arreſt, and therefore the rule that bail could not be taken *in infinitum* did not apply here. He cited *Kendall* v. *Carey*, 2 *Bl.* 768. where a Defendant having given bail in error upon a judgment in the *King's Bench*, and afterwards holden to bail in this Court in an action of debt upon the ſame judgment, this Court refuſed to diſcharge him, *Gould* J. ſaying, "the reaſon of this practice is becauſe there has never been bail given in this Court."

Cockell Serjt. *contrà* inſiſted, that this was within the rule that no man ſhould be twice holden to bail for the ſame cauſe of action, and that the cuſtody was the ſame as in the former arreſt.

The Court (conſiſting of HEATH, ROOKE, and CHAMBRE Js.) were of opinion, that the giving a warrant of attorney to confeſs judgment was tantamount to giving bail in the firſt action, and that the Defendant in this caſe, if held to bail again, would ſuffer preciſely the ſame vexation as in the common caſes to which the rule was allowed to extend.

Rule abſolute.

May 4th.

ROBINSON *v.* DUNMORE.

If *A.* ſend goods by *B.* who ſays "I will warrant they ſhall go ſafe," *B.* is liable for any damage ſuſtained by the goods, notwithſtanding *A.* ſend one of his own ſervants in *B.*'s cart to look after them.

ASSUMPSIT. The declaration ſtated, that in conſideration that the Plaintiff, at the ſpecial inſtance and requeſt of the Defendant, would deliver to the Defendant divers goods and chattels (ſpecifying them) to be taken care of, and ſafely and ſecurely carried and conveyed by the Defendant in and by a certain cart of Defendant from *A.* to *B.* and there to wit, at *B.* to be ſafely and ſecurely delivered to one *J. S.* for certain hire and reward to the

Defendant in that behalf, the Defendant undertook and promiſed to take care of the ſaid goods and chattels, and ſafely and ſecurely to carry and convey the ſame in and by his ſaid cart from *A.* to *B.* and there to wit, at *B.* ſafely and ſecurely to deliver the ſame to the ſaid *J. S.*; that the Plaintiff did afterwards deliver the ſaid goods and chattels to the Defendant, to be carried, conveyed, and delivered as aforeſaid. And that although the Defendant had and received the ſaid goods and chattels for the purpoſe aforeſaid, yet he did not take care of the ſaid goods and chattels, or ſafely and ſecurely carry or convey the ſame in and by his ſaid cart or otherwiſe from *A.* to *B.*, nor there to wit, at *B.* ſafely and ſecurely deliver the ſame to the ſaid *J. S.*, but on the contrary ſo careleſsly conducted himſelf in and about the carriage and conveyance of the ſaid goods and chattels, that a great part of them, to wit, &c. through his negligence were wetted and damaged.

The Defendant pleaded *Non-aſſumpſit.*

The cauſe coming on to be tried before Lord *Eldon* Ch. J. at the *Weſtminſter* Sittings after laſt *Hilary* Term, it appeared in evidence, that the Plaintiff who was an upholſterer, having occaſion to ſend ſome furniture into the country, agreed with one *Groves* a carman, to take the ſame for ten guineas, excluſive of tolls; that *Groves* thinking the diſtance too great, offered the Defendant who alſo kept a cart and horſe, the refuſal of the job, who agreed to undertake it and gave *Groves* half-a-guinea by way of gratuity; that the Plaintiff having acceded to the Defendant's offer to go inſtead of *Groves*, the Defendant brought his cart to the Plaintiff's houſe, where the goods were loaded in the preſence of the Plaintiff himſelf, and with the aſſiſtance of two of the Plaintiff's ſervants; that the Plaintiff having obſerved that the tarpaulin which the Defendant had brought for the purpoſe of covering the cart was too ſmall, the Defendant ſaid, "I have plenty of ſacks, and I will warrant the goods ſhall go ſafe." On account of the Defendant being a ſtranger to the Plaintiff, the latter ſent one of his own porters with the cart, who would otherwiſe have gone by the ſtage; that this porter in the courſe of the journey paid a perſon for watching the goods one night; and that the goods in the courſe of the journey were damaged by rain. A verdict was found for the Plaintiff under his Lordſhip's direction, with liberty for the Defendant to move that the verdict might be ſet aſide and a non-ſuit entered.

Accordingly *Williams* Serjt. having obtained a rule *Niſi* for that purpoſe, was this day called upon by the Court to ſupport the rule. It does not appear from the evidence that the Defendant ever had ſuch poſſeſſion of the Plaintiff's goods as to render him liable in the character of a common carrier. On the contrary it is clear from the Plaintiff having ſent his porter to accompany the cart, that he never intended to relinquiſh his control over the goods; and the circumſtances of the loading having been made at his houſe and under his inſpection, and of the porter having paid for watching them during the journey ſtrongly corroborate that idea. In this caſe there was no bailment: the Defendant could neither have maintained treſpaſs or trover. It was a mere contract between the Plaintiff and Defendant, that the former ſhould hire and the latter ſhould let a cart and horſe for the conveyance of the Plaintiff's goods. The caſe ſtrongly reſembles that of *The Eaſt India Company* v. *Pullen*, 1 *Str*. 690. where the Company having brought an action againſt a lighterman it appeared, that as ſoon as the goods were put into the lighter, an officer of the company went on board, and put the company's locks on the hatches: and Lord *Raymond* Ch. J. held that the goods were not to be conſidered as ever having been in the poſſeſſion of the lighterman, but in the poſſeſſion of the company's ſervant who had hired the lighter to uſe himſelf. There are many caſes in which perſons having a much greater control over goods than the Defendant had, are yet not conſidered as having the poſſeſſion: ſuch are the caſes of a butler who hath the charge of his maſter's plate, and the ſhepherd who hath the charge of his maſter's ſheep, 1 *H. P. C.* 506. *c.* 43. It is true that in the preſent caſe the Defendant made uſe of the expreſſion, that he would warrant that the goods ſhould go ſafe. But under all the circumſtances, it may be argued, that it was not his intention by that expreſſion to do any thing more than enforce his own opinion. Admitting however, that the Jury have decided that point againſt the Defendant, yet no advantage can be taken of the warranty in the preſent action, ſince the averment that the goods were delivered to the Defendant has not been ſubſtantially proved.

Heath J. (ſtopping *Vaughan* Serjt. for the Plaintiff.)—The Defendant in this caſe is not charged as a common carrier: he is charged on a ſpecial undertaking; and the Jury have found on good grounds that the undertaking ſtated in the declaration was made by the Defendant. They have decided upon conſidering the whole tranſaction, that the words uſed by the Defendant amounted to a warranty; and we cannot ſay that they have done wrong. It is quite immaterial to this caſe whether the Defendant had a ſpecial property, or any property whatever in the goods; or whether he could have maintained an action of treſpaſs or trover. He muſt have had poſſeſſion of them for the purpoſe of carrying his contract into effect, which he could not have done without ſuch poſſeſſion.

ROOKE J.—This is not the caſe of a common carrier, for the Defendant has ſpecially undertaken to carry the goods ſafely.

CHAMBRE J.—This is a very clear caſe. The Defendant is not a common carrier by trade, but has put himſelf into the ſituation of a common carrier by his particular warranty. As to poſſeſſion, that ſeems clearly proved by the circumſtances of the caſe; the Defendant attends with his horſe and cart at the Plaintiff's houſe, where the goods are delivered to him and put into the cart by the Plaintiff's ſervants. This is a compleat poſſeſſion. How is this affected by the preſence of the Plaintiff's ſervant? It has been determined, that if a man travel in a ſtage coach and take his portmanteau with him, though he has his eye upon the portmanteau yet the carrier is not abſolved from his reſponſibility, but will be liable if the portmanteau be loſt(*a*). In this caſe the Plaintiff for greater caution ſends his ſervant with the goods, who pays for watching them becauſe he apprehends danger of their being ſtolen. So the man who travels in a ſtage has ſome care of his own property ſince it is more for his intereſt that the property ſhould not be loſt than that he ſhould have an action againſt the carrier. This caſe bears no reſemblance to that cited from *Strange*, for there the deciſion proceeded on the uſage of the *Eaſt India* Company, who never intruſt the lightermen with their goods, but give the whole charge of the property to one of their own officers who is called a guardian. The evidence of the warranty is perfectly clear, for on the Plaintiff's making ſome objection to the ſmallneſs of the tarpaulin, the Defendant in order to remove that difficulty, informed him that he had plenty of ſacks to cover the goods, and undertook that they ſhould be carried ſafe. It appears to me, that the verdict is perfectly right, and that the Jury could not have done otherwiſe than they have done.

Poſtea to the Plaintiff.

(*a*) So "it is no excuſe for an innkeeper to ſay that he delivered the key of the chamber door to the gueſt in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his gueſts in ſafety; and therewith agree 22 *H.* 6. 21. 11 *H.* 4. 45. 42 *Ed.* 3. 11." *Calye*'s caſe, 8 *Co.* 33.

May 5th.

BOLT *v.* MILLER.

An affidavit to hold to bail, in which a tender in bank notes is negatived by the Plaintiff's clerk alone, then reſident in *London*, is inſufficient if the Plaintiff be alſo reſident in *London*; though the debt aroſe upon a bill tranſaction, of which the clerk had the ſole management.
If an affidavit to hold to bail be made by a perſon *prima facie* incompetent to make it; *quære* whether circumſtances proving him to be competent can be ſhewn by affidavit for cauſe againſt a rule for diſcharging the Defendant on a common appearance.

THIS was a rule calling on the Plaintiff to ſhew cauſe why the Defendant ſhould not be diſcharged out of cuſtody, on the ground of the affidavit of debt having been ſworn by a clerk of the Plaintiff's, and of his having taken upon himſelf to negative any tender in Bank notes, as well as to ſwear to the debt.

In ſhewing cauſe againſt this rule, *Beſt* Serjt. produced affidavits of the Plaintiff and of his clerk, to ſhew that the debt in queſtion aroſe upon a bill tranſaction, which had been completely conducted by the clerk, and that the Plaintiff himſelf, though living in *London*, knew nothing of the buſineſs. He alſo referred to *Chatterley* v. *Finck*, *ante* p. 390. and alſo to the *Mayor of London* v. *Dias*, 1 *Eaſt*. 237 (*a*). where an affidavit of debt made by "*James Byfield* clerk to *R. C.* Eſq. chamberlain of the city of *London*," negativing the tender in Bank notes was held ſufficient.

But *The Court* (conſiſting of HEATH, ROOKE, and CHAMBRE Js.) were of opinion, that though the debt might be better ſworn to by the clerk than the Plaintiff ſtill they ſhould both have joined in negativing the tender in Bank notes as they were both in *London*. They alſo ſeemed to doubt whether admitting affidavits explanatory of the reaſons why the clerk made the affidavit of debt was not trenching on the rule laid down that no ſupplemental affidavit ought to be received to cure defects in affidavits under the *Bank Act*.

Rule abſolute (*b*).

(*a*) See alſo *Knight* v. *Keyte*, 1 *Eaſt*. 415.

(*b*) See *Smith* v. *Tyſon*, *ante*, p. 389. and *Stacey* v. *Federici*, *ante*, 390.

May 7th.

POWELL *v.* FULLERTON and POWELL.

A writ in debt may be abated in part and ſtand good for the remainder. If a plea in abatement contain matter which goes in part abatement of the writ only, but conclude with a prayer that the whole writ may be abated, the Court may abate ſo much of the writ as the matter pleaded applies to.

DEBT for 5000*l*. The declaration conſiſted of five counts; the 1ſt and 2d were upon bond; the 3d for money borrowed; the 4th on an account ſtated, and the 5th for intereſt.

1801.
POWELL
v.
FULLERTON
and
POWELL.

The Defendant *Fullerton* pleaded to the 1ſt and 2d counts of the declaration *Non eſt factum*, and put himſelf upon the country, and then proceeded thus " and as to the writ of the Plaintiff and the declaration founded thereon as to the 3d, 4th, and 5th counts the Defendant prays judgment of the ſaid writ and the ſaid declaration as to the ſaid 3d, 4th, and laſt counts, and that the ſaid writ and declaration as to thoſe counts may be quaſhed becauſe he ſaith that the ſaid ſeveral ſuppoſed debts or ſums of money in ſaid 3d, 4th, and laſt counts reſpectively mentioned if any ſuch debts or ſums of money were accrued or were due and owing unto the Plaintiff were and each and every of them were and was due and owing from the Defendants jointly and together with one *Robert Dyde* unto the Plaintiff and not from the Defendants only, and which ſaid *Robert Dyde* is ſtill living to wit at *Weſtminſter* aforeſaid in the ſaid county and this the Defendant *Fullerton* is ready to verify wherefore inaſmuch as ſaid *Robert Dyde* is not named in the ſaid writ and declaration the Defendant *Fullerton* prays judgment of the ſaid writ and the ſaid declaration as to the 3d, 4th, and laſt counts thereof and that the ſaid writ and ſaid declaration thereon founded as to the ſaid laſt-mentioned counts may be quaſhed."

To this plea, to the three laſt counts, the Plaintiff demurred " becauſe ſhe ſaith that the ſaid plea of the Defendant *Fullerton* and the matters therein contained in manner and form as the ſame are above pleaded and ſet forth are inſufficient in law to quaſh the ſaid writ and the ſaid declaration thereon founded as to ſaid laſt mentioned counts or to excuſe the Defendant *Fullerton* from anſwering the Plaintiff in reſpect of thoſe counts nor is the Plaintiff under any neceſſity nor in anywiſe bound by the law of the land to anſwer the ſaid plea. And this &c."

The Defendants joined in demurrer.

Beſt Serjt. in ſupport of the demurrer. The writ in debt being a general writ cannot be abated in part; now the plea in abatement pleaded by *Fullerton* goes only to the three laſt counts of the declaration, and at any rate is bad, becauſe it prays judgment of the whole writ. Where by the writ two diſtinct things are demanded, it may be abated in part and ſtand good for the remainder; but in this caſe the ſingle demand contained in the writ is for 5000*l*. It might be different indeed if the Plaintiff on his own ſhewing appeared to have no cauſe of action for more than a part; but here the matter relied on by *Fullerton*, by way of anſwer to part of the demand contained in the Plaintiff's declaration, is pleaded

1801.

Powell v. Fullerton and Powell.

pleaded by *Fullerton* himſelf. In *Weeks* v. *Peach*, 1 *Salk.* 179. it is ſaid "If a plea begin with an anſwer to the whole but in truth the matter pleaded is only an anſwer to part, the whole plea is naught and the plaintiff may demur." Now in this caſe the plea begins with an anſwer to the whole writ, whereas the matter pleaded is only an anſwer to part of the writ.

Onſlow Serjt. *contrà.*—There is a caſe 1 *Hen.* 5. *fol.* 4. *b. pl.* 5. which is an expreſs authority to ſhew that a writ in debt may be abated in part and ſtand good for the remainder. That was a writ in debt in which the Plaintiff demanded parcel on obligation, and parcel on ſimple contract, and there was a variance between the Defendant's name in the writ and in the obligation; for this cauſe the writ was abated as to the obligation, but the Plaintiff prayed that the Defendant might anſwer as to the ſimple contract; upon which follows this obſervation in the report "*quod notà* that the writ in debt may abate in part and ſtand good in part." Another ſtrong authority to ſhew that the writ may be abated in part is *Godfrey*'s caſe, 11 *Co.* 45. *b.* and the caſes there cited. Had the Defendant in this caſe prayed that the declaration only might be quaſhed, the anſwer would have been "plead to the writ." In none of the entries is there any precedent of a plea that others were joint contractors with the party ſued, praying that the declaration only may be quaſhed, though there are ſeveral praying that the writ only may be quaſhed. *Clift. Ent.* 4. *pl.* 6. *p.* 7. *pl.* 17. In this plea the Defendant *Fullerton* only prays judgment of the writ, and the declaration as to the 3d, 4th, and laſt counts; in that reſpect following the rules preſcribed by the Court of *King's Bench*, in *Herries* v. *Jamieſon*, 5 *Term Rep.* 553. and not as in that caſe pleading to the whole declaration matter which only anſwers part of the declaration.

Cur. adv. vult.

Heath J. (after ſtating the pleadings)—It was contended in ſupport of this demurrer, that the plea demands that the whole writ ſhall be abated, whereas the matter pleaded only applies to a part of the writ. The caſe of *Herries* v. *Jamieſon* was cited. But there the plea went in abatement of the writ only, and part of the declaration was not anſwered; and for that reaſon the demurrer was allowed. The firſt queſtion is, Whether judgment of the whole writ is demanded in this plea? And we are unanimouſly of opinion that it is ſo demanded. Then next it comes to be conſidered, Whether a general writ of debt is diviſible, ſo that it may be abated in part and remain good for the reſidue? The caſe in the *Year Books* 1 *H.* 5. 4. *b.* is deciſive of that point; there it was actually divided. The principle is equally clear. A jointenancy of parcel ſhall not abate the whole writ, though the demand be of a thing entire, as of a manor. *Doctrina placitandi*, *fo.* 7. The next queſtion, concerning which we had the greateſt difficulty, is, Whether the party having demanded judgment that the whole writ ſhould be abated, the Court can only abate it in part. On looking into *Raſtall* I find ſeveral entries where the prayer has been for the abatement of the whole writ, and the judgment of the Court has been that the writ ſhall abate in part only; and I can find no inſtance in thoſe entries of a prayer for the partial abatement of the writ (*a*). The entries alluded to are *fo.* 108. *b.* 109. *a.* 233 (*b*). There are two other entries *fo.* 126. (*c*) where the prayer is general for the abatement of the writ and the cauſe is applicable to one only of ſeveral Defendants, but there the parties join iſſue on the fact. On the part of the Plaintiff the caſe of *Weeks* v. *Peach*, *Salk.* 179. has been cited, and the *dictum* of Lord *Holt* relied on, that where a plea begins with an anſwer to the whole, but in truth the matter pleaded is only an anſwer to part of the declaration, the whole plea is naught, and the Plaintiff may demur. The plain ſenſe of which I take to be, that the party in not anſwering the whole of his adverſary's declaration, but leaving ſome part unanſwered makes a diſcontinuance. Here the Defendant has anſwered every material part of the writ and declaration, by pleading to ſome of the counts and demanding judgment of the reſidue and of the writ. It follows that if the demand or petition of a plea be too large the Court may abridge it, *nam omne majus continet in ſe minus*; and he who demands judgment of the whole writ demands judgment of every part of it. We are therefore of opinion on theſe authorities that the Court may and ought to moderate the prayer of the Defendant, and the judgment muſt be that ſo much of the ſaid writ as regards the 3d, 4th, and laſt counts of the Plaintiff's declaration, and alſo the 3d, 4th, and laſt counts of the Plaintiff's declaration be ſeverally quaſhed, and that the Plaintiff at his peril may proſecute his ſuit for the reſidue.

(*a*) In *Raſtall's Entr.* fo. 256. *a.* ed. 1566. *Entre brevis* Aſſiſe, pl. 7. where the Tenants in a writ of entry plead Non-tenure of part of the premiſes in abatement, the plea concludes *Unde quoad tertiam partem illam petunt judicium de brevi*, &c.

(*b*) Tit. *Briefe* mort. pl. 3. *Entre brevis* Briefe, pl. 2. fo. 107. *b.* 108. *a.* 259. *a.* ed. 1566.

(*c*) Tit, *Conſpiracy* count, pl. 5. fo. 124. *b* ed. 1566.

1801.

May 9th.

BRIGDEN *v.* PARKES and Others, Executors.

The three firſt counts of a declaration in *aſſumpſit* againſt executors ſtated promiſes made by the teſtator; the 4th was for money had and received by the Defendants " as ſuch executors as aforeſaid," ſtating a promiſe to pay by them " executors as aforeſaid"; and the laſt was upon an account ſtated by the Defendants " executors as aforeſaid" and ſtating the promiſe to pay in the ſame manner. Held bad on general demurrer.

ASSUMPSIT. The two firſt counts of the declaration ſtated, that in conſideration that the Plaintiff had delivered to the teſtator in his life-time certain hops, to be ſold, the teſtator promiſed to account for them when requeſted. The 3d count was for money had and received by the teſtator in his life-time, to the uſe of the Plaintiff which the teſtator promiſed to pay. The 4th alleged that the Defendants were indebted for money had and received by them " as ſuch executors as aforeſaid," to the uſe of the Plaintiff, and " being ſo indebted the Defendants executors as aforeſaid" promiſed to pay the ſame. The laſt count ſtated, that the Defendants " executors as aforeſaid" accounted with the Plaintiff concerning divers ſums of money of the Plaintiff due from the Defendants " executors as aforeſaid" and upon that accounting the Defendants " executors as aforeſaid" were found indebted to the Plaintiff, and in conſideration thereof the Defendants " executors as aforeſaid" promiſed to pay. To this declaration there was a general demurrer.

Bayley Serjt. in ſupport of the demurrer contended, that if a Plaintiff in the ſame action ſeek to recover ſeveral demands, ſome of which accrue from the Defendant in his own right, and others in right of another, it is the ſubject of general demurrer, may be aſſigned for error, and is ground for arreſting the judgment; that in the preſent caſe the cauſes of action ſtated in the 4th and laſt counts of the declaration appeared to have ariſen after the death of the teſtator, and that the Defendant therefore was liable in reſpect of thoſe cauſes of action in his own right, and was ſubject to a judgment *de bonis propriis*, whereas he was only liable in the right of his teſtator in reſpect of the cauſes of action contained in the three firſt counts, and no other judgment could be obtained againſt him than a judgment *de bonis teſtatoris*. He cited *Jennings* v. *Newman*, 4 *Term Rep.* 347. and *Roſe* v. *Bowler*, 1 *H. Bl.* 108. as in point. He alſo urged that even ſuppoſing the cauſes of action contained in the 4th and laſt counts to be capable of being joined with thoſe ſtated in the three firſt, yet that it was not ſufficiently ſtated in the 4th and laſt counts, that the cauſes of action aroſe againſt the Defendants as executors, the promiſe in the 4th count being ſtated to have been made by the Defendants *executors as aforeſaid*, not by the Defendants as ſuch executors as aforeſaid;

and in the laſt count both the accounting and the promiſe being ſtated in the ſame manner.

Shepherd Serjt. *contrà* obſerved, that if the Defendants were liable as executors upon the cauſes of action ſtated in the 4th and laſt counts it could not make any difference whether it were ſtated that they *executors as aforeſaid* or *as ſuch executors as aforeſaid* were liable. He admitted however that upon the fourth count they muſt be conſidered as liable in their own right, though according to the authority of *Secar* v. *Atkinſon*, 1 *H. Bl.* 102. they might be liable as executors upon the account ſtated. But he urged that the miſ-joinder of theſe ſeveral cauſes of action was only matter of ſpecial demurrer and ought therefore to have been ſpecially aſſigned for cauſe: for that on a general demurrer if there be any one good count the Plaintiff is entitled to take his judgment upon that count.

But *The Court* were of opinion that it was matter of general demurrer; that it might be alleged in arreſt of judgment, or aſſigned for error.

Leave was given to amend on payment of coſts.

BURGESS *v.* FREELOVE.

May 9th.

Treſpaſs for aſſault and falſe impriſonment may be laid *diverſis diebus et vicibus.*

TRESPASS for aſſault and falſe impriſonment. The declaration conſiſted of three counts, the 1ſt of which alleged, that the Defendant "on the 28th day of *February* 1800, and on divers other days and times between that day and the day of ſuing forth of the original writ at &c. aſſaulted the Plaintiff and beat &c. and there at and on thoſe ſeveral days and times without any reaſonable or probable cauſe whatſoever impriſoned him &c. and cauſed him to be impriſoned for a long ſpace of time *to wit* for the ſpace of 48 hours at and on thoſe and each and every of thoſe times without the leave &c."; the 2d and 3d counts alleged that "on the day and year aforeſaid and on divers other days and times &c." the Defendant aſſaulted the Plaintiff.

The Defendant demurred ſpecially and aſſigned for cauſes, "that the ſaid Plaintiff hath in and by the ſaid 1ſt count of the ſaid declaration alleged that the ſaid Defendant on the 28th of *July* 1800 and on divers other days and times between that day and the day of ſuing forth of the ſaid original writ of the ſaid Plaintiff

BURGESS *v.* FREELOVE.

in this behalf aſſaulted the ſaid Plaintiff and beat bruiſed wounded and ill-treated him and at and on thoſe ſeveral days and times impriſoned him the ſaid Plaintiff and cauſed and procured him to be impriſoned and detained him in priſon and cauſed and procured him to be kept and detained in priſon for a long ſpace of time at and on each and every of thoſe times whereas the ſaid Plaintiff in the ſaid firſt count of the ſaid declaration ought to have ſtated and alleged that the ſaid Defendant on ſome one certain determined day only and not on more than one day nor as aforeſaid aſſaulted the ſaid Plaintiff and beat and bruiſed wounded and ill treated him and on that one certain and determined day only and not on more than one day nor as aforeſaid impriſoned him the ſaid Plaintiff and cauſed and procured him to be impriſoned and kept and detained him in priſon for a long ſpace of time and alſo for that the ſaid Plaintiff hath not in or by the ſaid 1ſt count of the ſaid declaration ſtated or alleged that the ſaid ſeveral treſpaſſes therein mentioned or any of them were committed on one certain day only as he ought to have done, but on the contrary thereof hath ſtated and alleged that thoſe treſpaſſes were committed on divers days and times And alſo for that the ſaid Plaintiff hath laid and charged the ſaid ſeveral treſpaſſes in the ſaid firſt count of the declaration mentioned under a *continuando* whereas the ſame and every of them ought to have been laid and charged to have been committed on one certain fixed and determinate day only and not under a *continuando* And alſo for that it does not in or by the ſaid firſt count of the ſaid declaration appear with certainty or preciſion that all or any of the ſaid ſeveral treſpaſſes therein ſuppoſed to have been committed by the ſaid Defendant were committed on the ſaid 28th day of *July* in the ſaid firſt count mentioned only or on any other certain day only but that thoſe treſpaſſes were ſeverally committed on divers days and times And alſo for that the ſaid firſt count of the ſaid declaration comprizes and includes divers diſtinct and ſeparate cauſes of action which ought not and by law cannot be included in one and the ſame count And alſo for that the ſaid 1ſt count of the ſaid declaration is in divers and very many other reſpects informal" &c. To the 2d and 3d counts the cauſes aſſigned were the ſame, only introducing them as to each count thus " for that the ſaid Plaintiff hath in and by the ſaid count alleged that the ſaid Defendant on the day and year in that count mentioned and on divers other days and times" &c. The Plaintiff joined in demurrer.

Beſt Serjt. in ſupport of the demurrer cited *Michell* v. *Neale et Ux. Cowp.* 828. as being preciſely in point, and to an obſervation from the Court, that the caſes cited in ſupport of the demurrer in *Michell* v. *Neale* were againſt it, he anſwered, that in thoſe caſes the objection had not been taken on ſpecial demurrer. He alſo urged that it was impoſſible for the Defendant to plead to an aſſault laid as in the preſent caſe.

Shepherd Serjt. *contrà*, obſerved, that the caſe of *Michell* v. *Neale* was decided on a miſunderſtanding of the difference between laying an aſſault *diverſis diebus et vicibus*, and with a *continuando*.

The Court (conſiſting of **Heath**, **Rooke** and **Chambre** Juſtices) were of opinion that the caſe of *Michell* v. *Neale* could not be deemed a ſound authority, and referred to *Monkton* v. *Aſhley*, 6 *Mod.* 38. *Salk.* 638. where *Holt* Ch. J. and *Powell* J. take the difference between a *continuando* and *diverſis diebus et vicibus*, and ſhew that no inconvenience can ariſe to the Defendant from either mode of laying the aſſault, ſince evidence can only be given of a ſingle act (*a*).

The Court gave the Defendant leave to withdraw his demurrer on payment of coſts.

(*a*) See alſo on this ſubject the note to *The Earl of Mancheſter* v. *Vale*, 1 *Saund.* 24. by Mr. Serjt. *Williams*.

GRAY, Executor, *v.* PINDAR.

May 11th.

Aſſumpſit on a note payable by inſtalments; plea in bar as to the ſaid ſeveral cauſes of action except the laſt inſtalment that "the ſaid ſeveral cauſes of action did not nor did any of them accrue within ſix years". Held on ſpecial demurrer that though ſome of the inſtalments might be barred and others not, yet the introduction to the plea and the body of it were inconſiſtent.

Aſſumpſit. The firſt count of the declaration was on a promiſſory note dated the 18th *September* 1783, whereby the Defendant promiſed to pay to the Plaintiff's teſtator, or his order, the ſum of 80*l.* in manner following, *viz.* the ſum of 5*l.* upon the 5th of *April* then next, the ſum of other 5*l.* on the 10th of *April* 1784, and the like ſum of 5*l.* half-yearly until the ſaid ſum of 80*l.* was fully paid and ſatisfied.

The ſecond count was for intereſt, and there were other counts for money paid, lent, had and received, and on an account ſtated.

The Defendant pleaded 1ſt, *Non aſſumpſit*. 2dly, As to the ſaid ſeveral cauſes of action in the ſaid declaration mentioned, except as to the damages ſuſtained by the Plaintiff as ſuch executor as aforeſaid by reaſon of the laſt half-yearly payment of 5*l.* in the ſaid firſt count of the ſaid declaration mentioned, the Defendant by leave &c. ſays *actionem non*, becauſe he ſays, that the ſaid ſeveral cauſes of action in the ſaid declaration mentioned did not, nor did any of them accrue to the Plaintiff at any time within ſix years next before the day of ſuing out the original writ of the Plaintiff And this &c. Wherefore, &c.

To this ſecond plea the Plaintiff demurred ſpecially, and aſſigned for cauſes, "that the introductory part of the ſaid plea of the ſaid Defendant by him laſtly above pleaded in bar is inconſiſtent with and contradictory to the allegation of the ſaid plea in this that the ſaid plea purporting to be pleaded in bar to part only of the ſaid ſeveral cauſes of action in the ſaid declaration mentioned contains matter alleged and pleaded in bar to all of thoſe ſaid ſeveral cauſes of action; and in this that the introductory part of the ſaid plea admits that the ſaid *John Gray* as ſuch executor as aforeſaid hath ſuſtained damage by reaſon of the non-payment of the laſt half-yearly payment of 5*l.* in the firſt count of the ſaid declaration mentioned yet the matter alleged in the ſaid plea is pleaded therein in bar to all the ſaid ſeveral cauſes of action in the ſaid declaration mentioned. And alſo that the ſaid cauſe of action of the ſaid Plaintiff in the ſaid firſt count of the ſaid declaration mentioned ariſes upon a promiſſory-note to pay the entire ſum of 80*l.* in that count mentioned and a promiſe and undertaking of the ſaid Defendant to pay that preciſe and ſpecific ſum, and that the ſaid Defendant in and by his ſaid laſt-mentioned plea admits that the ſaid cauſe of action in the ſaid firſt count of the ſaid declaration mentioned did accrue to the ſaid Plaintiff within ſix years next before the day of the ſuing out of the ſaid original writ of the ſaid Plaintiff. And alſo that the ſaid laſt-mentioned plea is in various other reſpects inſufficient, informal, vague and uncertain," &c.

Heywood Serjt. in ſupport of the Demurrer. The contract ſtated in the firſt count of the declaration being an entire contract to pay 80*l.* no action could be maintained upon the note until all the inſtalments were due, and conſequently as the plea admits that the ſtatute of limitations had not run againſt the laſt inſtalment, it cannot bar the Plaintiff from recovering the reſt. In *Hunt* v. *Sone*, *Cro. Eliz.* 118. which was *aſſumpſit* for the occupation of lands from ſuch a day for five years under a promiſe to pay 20*l.* for every year at two feaſts, with an averment that the Defendant had occupied the land for a year and a half, the Court held that if the promiſe had been that the Defendant ſhould enjoy the land for five years, and in conſideration thereof ſhould pay 100*l.* in five years, *viz.* 20*l. per annum*, the action would not lie for part till all the term was expired. So in *Francam* v. *Foſter*, *Skinn.* 326. *Holt* Ch. J. ſaid, "If a man agrees to pay ſuch a ſum at three ſeveral days, here he may not declare for this ſum until the days are paſt." [But *the Court* ſaid, that it had been expreſsly decided of late years that an action of *aſſumpſit* may be maintained for each ſeparate inſtalment of a debt ariſing upon ſimple contract; though no action of debt can be maintained until all the inſtalments are due (*a*).] Admitting however, that the Plaintiff might at his election have maintained an action on each inſtalment, yet he has a right to conſider the whole ſum as one entire debt, and having done ſo in this caſe, it was not competent to the Defendant to ſever it. But at all events this plea is informally pleaded; for the introductory part of the plea profeſſes to anſwer only a part of the declaration, whereas the body of it gives an anſwer to the whole. The Defendant in the former part admits that the ſtatute of limitations does not extend to the laſt inſtalment, and yet in the latter part he ſtates that the ſaid ſeveral cauſes of action in the Declaration mentioned did not, nor did any of them accrue within ſix years. This is an inconſiſtency on the face of the plea.

Bayley Serjt. *contra*. The Defendant by the introductory part of his plea has confined his anſwer to part only of the declaration, and notwithſtanding the ſubſequent matter which amounts to an anſwer to the whole declaration, the Plaintiff is entitled to judgment upon that part to which the introduction does not apply. But it does not follow, becauſe the Defendant has introduced matter into his plea which would have afforded an anſwer to the whole declaration if the introduction had been equally extenſive that he ſhall therefore be reſtrained from availing himſelf of ſo much of the matter pleaded as the introduction warrants. The introduction profeſſes to anſwer all the cauſes of action in the declaration except the laſt inſtalment; the ſubſequent matter anſwers all the cauſes of action: it is clear therefore that it anſwers all thoſe which are contained in the introduction, and if it anſwer any thing more that ought not to prejudice the Defendant. It is

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(*a*) *Rudder* v. *Price*, 1 *H. Bl.* 547.

ſaid in *Woodward* v. *Robinſon*, 1 *Str.* 303. that if a plea be pleaded as an anſwer to part, though in law it is an anſwer to the whole it is a diſcontinuance; but it is not ſaid that the plea is bad (*a*). In the preſent caſe there can be no diſcontinuance ſince the firſt plea is pleaded as an anſwer to the whole declaration.

The Court held the plea inconſiſtent: but as the cauſe had already been tried and a verdict found for the Defendant on the general iſſue they gave him leave to amend without payment of coſts.

(*a*) If a plea be pleaded as an anſwer to the whole, and the matter pleaded be only an anſwer to part, the whole plea is bad and the Plaintiff may demur. *Weeks* v. *Peach*, 1 *Salk.* 179.

May 11th.

Hurry and others *v.* The Royal Exchange Assurance Company.

Inſurance on goods from *A.* to *B.* "until they ſhould be there diſcharged and ſafely landed;" on their arrival at *B.* the merchant to whom the goods belonged, employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loſs.

This was an action on a policy of aſſurance on ſhip and goods from *Peterſburgh* to *London*, including the riſk of boats to *Cronſtadt* beginning the adventure on the ſaid goods and merchandizes from and immediately following the loading thereof on board the ſaid boats at *Peterſburgh*, and on the ſhip at *Cronſtadt*; to continue upon the ſhip until ſhe ſhould be arrived at *London*, and had there moored at anchor twenty-four hours in good ſafety, and upon the goods and merchandizes until they ſhould be there diſcharged and ſafely landed.

The cauſe was tried before Lord *Eldon* Ch. J. at the Guildhall Sittings after laſt *Hilary* Term, when it appeared that the ſhip and cargo (conſiſting of hemp) arrived in ſafety in the river *Thames*; that the Plaintiffs being the conſignees of the goods, by their broker employed and paid a lighterman belonging to one of the public lighters entered at *Waterman's Hall* to land the hemp; that the hemp was damaged on board the lighter, but without any negligence imputable to the lighterman; that it is the conſtant practice for merchants in the *Ruſſian* trade to land their goods by means of lighters, and that there are no other lighters now in uſe among the merchants but the public lighters. A verdict was found for the Plaintiffs with liberty to the Defendants to move to have a non-ſuit entered on the ground of the inſurance being diſcharged by the delivery of the hemp to the lighters employed and paid by the conſignees of the cargo.

Accordingly a rule *Niſi* having been obtained on a former day,

Shepherd, *Heywood*, and *Bayley* Serjts. now ſhewed cauſe. The queſtion is whether the damage which the goods ſuſtained on board the lighter be one of the riſks inſured againſt by this policy? It muſt be admitted that if the loſs had happened on board one of the ſhip's boats the underwriters would have been liable; it is not therefore neceſſary that the loſs ſhould happen on board the ſhip itſelf, but it is ſufficient if it happen in the ordinary courſe of conveying the goods on ſhore. In the caſe of *Pelly* v. *The Royal Exchange Aſſurance Company*, 1 *Bur*. 341. the goods having been placed in a warehouſe built on a ſand bank in the river of *Canton* in *China* while the ſhip was repairing, were deſtroyed by fire; yet as that unloading of the goods appeared to have been in the ordinary courſe of the voyage, the Court held the underwriters liable; and Lord *Mansfield* there cited a caſe of *Tierney* v. *Etherington* before *Lee* Ch. J. where it was ruled that a loſs happening on board a ſtore ſhip at *Gibraltar* was covered by a policy containing an agreement, that upon the arrival of the ſhip at *Gibraltar* the goods might be unloaded and reſhipped in one or more *Britiſh* ſhip or ſhips for *England* or *Holland*. The expreſſions of *Lee* Ch. J. were "the conſtruction ſhall be according to the courſe of trade in this place, and this appears to be the uſual mode of unloading and reſhipping in this place, *viz.* that when there is no *Britiſh* ſhip there, then the goods are kept in ſtore ſhips." Indeed the Court will attach that meaning to the words "ſafely landed," which the courſe of trade puts upon them; and Lord *Mansfield* in 1 *Bur*. 348. ſays, "when goods are inſured *till landed* without expreſs words, the inſurance extends to the boat, the uſual method of landing goods out of a ſhip upon the ſhore." It is true that the caſe of *Sparrow* v. *Carruthers*, 2 *Str*. 1236. ſeems to be an authority in the Defendant's favour, ſince it was there holden that the owner of the goods by landing them in his lighter diſcharged the underwriters. But with reſpect to that caſe it may be obſerved that it was only a *Niſi Prius* deciſion, that the doctrine of *Lee* Ch. J. in *Tierney* v. *Etherington* is inconſiſtent with that laid down by him in *Sparrow* v. *Carruthers*, that it is contradicted by a caſe of *Langloie* v. *Brant*, before *Willes*

1801.

HURRY *v.* ROYAL EXCHANGE ASSURANCE COMPANY.

les Ch. J., and that even ſuppoſing it to be good law ſtill it is not an authority in the preſent caſe, ſince as the lighter there belonged to the owner of the goods he might be conſidered as having taken them into his own cuſtody, whereas the lighter in the preſent caſe was a public lighter employed in the uſual courſe of trade. This diſtinction is expreſsly recognized by *Buller* J. in the caſe of *Rucker* v. *The London Aſſurance Company* (*a*).

Lens

(*a*) *Rucker* v. *London Aſſurance Company.* At GUILDHALL, *Tueſday, 8th June* 1784. *Coram* Buller J.

This was an action on a policy of inſurance on the *Eliza Sophia,* at and from *Grenada* to *London,* on the ſhip until moored twenty-four hours, and on goods until ſafe diſcharged and landed, and the declaration ſtated, that before the goods, *viz.*—hogſheads of ſugar, were ſafely diſcharged and landed, they by the perils of the river *Thames* and the waters thereof were waſhed away and loſt.

The ſeveral wharfs between *London Bridge* and the *Tower* are called *Free Quays,* at which only foreign produce liable to pay duties can be landed. The owners of moſt of theſe quays entered into a partnerſhip, which was to expire at *Lady-day* then next; and not only did the buſineſs of wharfingers, but of lightermen, employing their own lighters in diſcharging ſuch veſſels as were to land goods at their wharfs. The owners of ſome of the wharfs, not of the company, have alſo their own lighters, while the owners of others are not poſſeſſed of lighters of their own, but employ public lightermen. When a ſhip arrives in the river, the firſt thing that is done is to quay the ſhip. When a ſhip is quayed at a wharf belonging to one of the company, the company provides lighters and does all that is neceſſary for landing: when at a wharf not belonging to any of the company, the owners provide lighters, &c. All the wharfs do not keep lighters or employ the company, but employ perſons having lighters but no wharf, as *Drinkall,* the perſon who was employed here by the Plaintiffs. It is not uſual for merchants to employ lightermen, they uſually leave it to the wharfinger, but *Hibbert*'s houſe (and that only) generally employs one lighterman.

The Plaintiff applied to the agent for the company of wharfingers to land the ſugars in queſtion, but they not being able to undertake the buſineſs, and the Plaintiff fearing the ſhip might be kept on demurrage, one *Drinkall* who followed the buſineſs of a lighterman, was applied to by him with conſent of the company. *Drinkall*'s uſual buſineſs was to work out rums, and he has been often employed by the company, and on this occaſion was, when applied to, employed by them in working out the ſhip *Experiment,* but as a favour he left her to work out theſe ſugars. *Drinkall* was a public lighterman for hire, and his lighter was numbered at *Waterman's Hall,* without which no lighter could be allowed to work. On the 30th *September,* fifty-ſeven hogſheads of ſugar were put on board his lighter, and there were two men on board (which are the uſual number for a lighter,) and the ſecond mate of the ſhip; as ſhe was proceeding to the ſhore ſhe ſtruck upon the anchor of a ſhip, and ſunk through unavoidable accident, without any imputation of neglect in any body on board. The ſugars were of courſe much damaged, and this action was brought to recover an average loſs of —— *per Cent.*

Bearcroft for the Defendants contended, that ſtrictly ſpeaking, the policy extended till the goods were landed by the ſhip's boats, but that the cuſtom of trade had for convenience ſubſtituted ſomething elſe, *viz.* lighters. The cuſtom here had not been complied with: for there was an important difference in the merchant taking upon himſelf to employ lightermen; this was not the courſe of trade, and the Defendants were thereby completely diſcharged from the ſubſequent loſs. A merchant may give up the cuſtom: and the Plaintiff has done it here. In the common courſe of trade he could not have got diſcharged under a week.

" Then,"

Lens and *Beſt* Serjts. in ſupport of the rule. The principle of law laid down in *Sparrow* v. *Carruthers* muſt now prevail. It ſeems to be ſettled that if the goods are received out of the ſhip in private lighters the underwriters are diſcharged. Now the only ground upon which this poſition can be ſupported is, that the poſſeſſion of the goods has been altered, and the owner has taken them into his own cuſtody. If this be the principle it can make no difference whether the lighter be publick or private: for the perſon who hires a public lighter for the conveyance of his own goods, makes that lighter as much his own *pro hac vice* as a pri-

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"Then," ſays he, "I diſmiſs every advantage from the cuſtom, I diſcharge the underwriters for my own reaſons and my own benefit." The freight is due (and it is only due when the voyage is ended,) when the goods are delivered to his lighter. If the Plaintiff's own lighter had been ſent it would not have been in the courſe of trade, and this is in effect the ſame thing.

BULLER J. told the Jury, that the deciſion of this cauſe depended on the uſage, but the fact of the uſage once eſtabliſhed, the queſtion, whether the underwriter is liable or not was matter of law. But it belonged to the Jury to ſay whether what had been done here was or was not in the uſual courſe of trade. There is no diſtinction between a public and private wharf, for a ſhip may go to either, and underwriters are equally liable at both. If ſhe goes to a private wharf the public lightermen are not employed, ſo that there are caſes in which the underwriters would be liable when the company is not employed. It is merely a voluntary ſociety, and theſe lighters are not on a different footing in any reſpect from the reſt of the lighters. If then that is not the line, what is? The line is between lighters which are public, and lighters which are the property of the merchants, and work only for them. The public lighters have a ſtamp of authenticity, they are entered at *Waterman's Hall*, as *Drinkall's* was, and have a public credit. The caſe in *Strange* (*Sparrow* v. *Carruthers*) does not interfere. If a merchant will not ſend public lighters entered at *Waterman's Hall*, it ſhall be a delivery to the merchant when the goods are put on board his lighter; but not if he ſends lightermen appointed by the *Waterman's* Company, and who are public officers. In the caſe in *Strange* the lighter is ſaid to be the property of the Plaintiffs, and one expreſſion of the Chief Juſtice is, that it would have been otherwiſe had the goods been ſent by the ſhip's boat, *i. e.* the lighter of the ſhip employed to diſcharge her, for it could not be the ſhip's boat literally ſpeaking, becauſe it would be impoſſible it could diſcharge a whole cargo.

If the Jury were of this opinion, he directed them to find for the Plaintiff.

Verdict for the Plaintiff.

Mr. J. BULLER before the opening of Plaintiff's caſe was finiſhed, aſked if the point in the cauſe had not been decided ſeveral times ſince he attended Guildhall?

Bearcroft for the Defendants mentioned *Sparrow* and *Carruthers* as in point.

BULLER J.—This has been determined ſome way or other, and I think differently in two caſes. If the lighter does not belong to a public company, but to the maſter of the goods himſelf, the underwriters are not liable, but if the lighterman is a public officer they are liable.

Lee for the Plaintiff cited from his own notes the caſe of *Langloie* and *Brant* before Lord C. J. WILLES, which was a much ſtronger caſe than *Sparrow* v. *Carruthers*. The policy was from *Jamaica* to — and till landed. The conſignee ſent his own lighter, and negligence was proved, and a ſpecial Jury found againſt the underwriters.

1801.

Hurry *v.* Royal Exchange Assurance Company.

vate lighter, and the goods while on board are completely in his own cuſtody. This caſe therefore does not depend upon the queſtion whether the goods have been taken out of the uſual courſe of the voyage, but whether the Plaintiff has not received them into his own cuſtody before they were actually landed, and thereby diſcharged the underwriters from the remainder of the riſk. Undoubtedly if the lighter employed in this caſe had been employed by the ſhip owner, the delivery of the goods would not have been complete until they were ſafely landed: but if the merchant find it inconvenient to wait for the delivery of the goods by the ſhip owner, but chooſes to receive them into a lighter whether public or private, he by that act puts an end to the voyage. Neither in *Pelly* v. *The Royal Exchange Aſſurance Company*, nor in *Tierney* v. *Etherington* could it be ſaid, that the goods had been delivered into the poſſeſſion of the owners, ſince the loſs in both caſes happened in the middle of the voyage. With reſpect to the opinion of Mr. J. *Buller* in *Rucker* v. *The London Aſſurance Company*, it is to be obſerved that the learned Judge lays great ſtreſs on the circumſtance of the lighter having been entered at *Waterman's Hall*, and conſiders the lighterman as a public officer, whereas that circumſtance gives no publicity of character to the lighter, but only makes the owner amenable to the regulations of the Company for miſconduct in the river, who is no more a public officer than a hackney coachman. As to the note which has been referred to of *Langloie* v. *Brant* it is not entitled to any credit, ſince it is there ſaid that negligence was proved, and yet that the underwriters were held liable.

Heath J.—The queſtion in this caſe is whether the goods inſured have been *ſafely landed* within the true intent and meaning of thoſe words in the policy, for to every part of the policy we muſt give compleat effect. Now, if we were to hold that the inſurers were diſcharged by the delivery of the goods to the lighter, we ſhould defeat the words ſafely landed, and render them altogether nugatory. It is admitted that the buſineſs of unloading the *Ruſſian* ſhips is carried on by public lighters, and that no private lighters are ever employed by the merchants. Now if that be ſo, what effect is to be given to the words "until the goods are ſafely landed," if they do not extend to the goods when on board the public lighter, for in no other manner can they be ſafely landed. It is true that the maſter and owners of the ſhip were diſcharged when the goods were put on board the lighter; but freight and inſurance are not commenſurate; the latter is far more extenſive than the former. The inſurance commences before the freight, for it commences when the goods are put on board the boats at *Peterſburgh*, and it alſo continues longer than the freight, for it does not determine until the goods are ſafely landed. There is no pretence for ſaying, that if the freighter of the goods had made uſe of his own boats in putting the goods on board at *Cronſtadt* the inſurers would have been thereby diſcharged. It has been argued however, that whenever the cuſtody of the goods is changed the inſurance is at an end; but that argument is founded on the notion of freight and inſurance being co-extenſive. With reſpect to the caſe of *Sparrow* v. *Carruthers*, I think it ought not to be extended; it was only a *Niſi Prius* deciſion, it has been cited ſeveral times, but never recognized, and whenever it has been cited great pains have been taken to diſtinguiſh it from the caſes before the Court, though perhaps not always with ſucceſs. I do not mean however to quarrel with that deciſion; a caſe preciſely ſimilar is not likely to ariſe again, ſince it is not cuſtomary for the owners of goods to ſend their own lighters, but always to employ public lighters.

Rooke J.—I am of the ſame opinion. The words of this policy are, that the underwriters ſhall continue liable until the goods are ſafely landed; now I think it is going too far to ſay, that when the goods are put on board the lighter they are ſafely landed. I cannot agree that this caſe depends on the queſtion, who employs the lighter? It appears to me to depend upon the queſtion, what the lighter is? For whether the lighter be employed by the owner of the goods or the owner of the ſhip, the landing of the goods is equally dangerous, and the riſk of the underwriters the ſame. The criterion ſeems to be whether it is a public lighter, publicly regiſtered, and in ſhort that ſort of lighter which is equally known to the underwriters and the owner of the goods. It is certainly much for the benefit of the underwriters, that this conſtruction ſhould prevail; ſince it is deſirable for him that the merchant ſhould as much as poſſible facilitate the landing of the goods; for the ſooner they are landed, the ſooner the riſk of the underwriters determines. If the body of underwriters were bound to elect whether theſe large *Ruſſian* ſhips ſhould be unloaded

1801.
HURRY
v.
ROYAL EXCHANGE
ASSURANCE
COMPANY.

loaded by means of theſe lighters employed by the perſons intereſted in the goods on board, or whether the unloading ſhould be left to the ſole management of a foreign captain, who probably knows very little about the nature of public or private lighters, and who muſt neceſſarily be much longer about it, I think they would not heſitate to chooſe the former method as moſt ſafe. With reſpect to the caſe of *Sparrow* v. *Carruthers*, Mr. Juſtice *Buller* has expreſsly taken the diſtinction between public and private lighters, which differs that caſe from the preſent.

CHAMBRE J.—This is a caſe of conſiderable conſequence in reſpect of the ſum which depends upon it, but of ſtill more in reſpect of the general queſtion which it involves; and if I entertained any doubts upon the ſubject I ſhould wiſh to take time before I delivered an opinion; but having none I think the ſooner we come to a deciſion the better. The argument for the underwriters reſts entirely on the caſe of *Sparrow* v. *Carruthers*. I do not wiſh to ſhake the authority of that caſe, nor indeed is it neceſſary ſo to do; but I cannot but obſerve, that if the deciſion had been otherwiſe I ſhould have been better ſatisfied. The caſe before Mr. Juſtice *Buller* has more weight with me: and particularly ſo, becauſe the parties acquieſced in his determination notwithſtanding they would have been armed with the authority of *Sparrow* v. *Carruthers* had they been inclined to bring the caſe before the Court. The only ſtrong ground upon which the caſe of *Sparrow* v. *Carruthers* can be ſupported (if indeed it can be ſupported at all,) is that the owner of the goods completely accepted them, and diſcharged the ſhip owner from any further concern in them. In this caſe I rely on the words of the policy and the known and ſettled uſage of trade. What can the words "until ſafely landed" refer to? It is admitted that it is impoſſible for theſe large veſſels to come up to the wharfs in order to deliver their goods; that the merchants have no lighters of their own, and that the ſhips' boats are inadequate to the purpoſe. In all caſes therefore, the goods muſt be delivered by the public lighters, and we muſt take the underwriters to be cognizant of the uſage of the trade which they inſure. I do not lay much ſtreſs on the notion of theſe lightermen being public officers: there are many trades which are under certain regulations, ſuch as porters, carmen, and hackney coachmen, and yet they are not public officers;

cers; but I rely on the conſtant uſage of trade, and on the words of the policy.

Per Curiam, *Poſtea* to the Plaintiffs.

STEEL *v.* ALLAN (*a*).

May 12th.

The Court will not compel ſecurity for coſts in error on the ground of the Plaintiff in error being a lunatic.

THIS was a rule calling on the Defendant or his attorney to ſhew cauſe why ſecurity ſhould not be given by one of them for the coſts of a writ of error on the judgment in this cauſe, otherwiſe the Plaintiff to be at liberty to proceed in the action and on the recognizance of bail notwithſtanding the allowance of the writ of error. To obtain this rule an affidavit had been produced, ſtating all the proceedings in the action, and alleging the belief of the Plaintiff's attornies, that there was no cauſe of error, the Defendant's attornies having agreed not to aſſign the want of an original as cauſe of error, and depoſing that ſince the commencement of the action a commiſſion in the nature of a writ *de lunatice inquirendo* had iſſued, under which the Defendant had been found a lunatic and a committee had been appointed.

Cockell Serjt. now ſhewed cauſe on the ground of this application being perfectly new in practice, and not ſupported by any principle.

Clayton Serjt. in ſupport of the rule argued, that the eſtate of the lunatic would not be liable, being under the controul of the crown, and therefore the Plaintiff would be haraſſed without any proſpect of being repaid the coſts of the writ of error to which the recognizance of bail does not extend (*b*).

But *The Court* refuſed to accede to the application.

Rule diſcharged.

(*a*) *Vide ante*, p. 362.

(*b*) By this muſt be meant the recognizance of bail in the Court below, for if it had been a caſe in which bail in error could have been taken, it would have been otherwiſe.

May 13th.

Bromley *v.* Coxwell.

A. entruſted *B.* with goods to ſell in *India*, agreeing to take back from *B.* what he ſhould not be able to ſell, and allowing him what he ſhould obtain beyond a certain price, with liberty to ſell them for what he could get if he could not obtain that price; *B.* not being able to ſell the goods in *India* himſelf, left them with an agent to be diſpoſed of by him, directing the agent to remit the money to himſelf in *England*. Held that *A.* could not maintain trover againſt *B.* for the goods.

TROVER for ſome prints. The cauſe was tried before Lord *Eldon* Ch. J. at the *Weſtminſter* Sittings after laſt *Hilary* Term, when the following facts appeared in evidence.

The Plaintiff being a printſeller, and the Defendant a mate of an *Eaſt Indiaman*, in *February* 1799 the latter was intruſted by the former with ſome prints to be diſpoſed of in *India* under the following agreement. "*William Bromley* agrees to ſend out by *James Coxwell* one hundred engravings from his plate of his Majeſty on horſeback under theſe conditions, that provided *James Coxwell* can diſpoſe of any one or all of them at above one guinea each, he the ſaid *James Coxwell* is to be accountable to *William Bromley* on his return to *England*, for as many as he may diſpoſe of at one guinea each; and *William Bromley* agrees to take all or as many as may be returned by the ſaid *James Coxwell*, provided he the ſaid *James Coxwell* cannot ſell them in *India* or at any other port he may touch at, without expecting any ſum from *James Coxwell* or making any charge; and *William Bromley* further agrees to and authorizes *James Coxwell* to ſell them for whatever they may fetch, if not more than one guinea may be offered for them ſeparately." The Defendant on his arrival at *Calcutta* not being able to obtain more than three ſhillings and five pence per print, at which ſum he ſold one only, carried the remainder to *Madras*, and there endeavoured to ſell them, but with no better ſucceſs, whereupon, judging for the beſt, he left the reſidue in the hands of an agent at *Madras* to be diſpoſed of by him, directing the agent to remit the money to him in *England*, at the *Jeruſalem Coffee-houſe*, *London*. On his arrival in *England*, he ſaid to a third perſon, "I have taken upon myſelf to leave the prints in *India*, and I hope Mr. *Bromley* will approve of what I have done."

The Jury found a verdict for the Plaintiff, ſubject to the opinion of the Court, whether under the above circumſtances trover could be maintained?

A rule having been obtained for ſetting aſide the verdict, *Beſt* and *Onſlow* Serjts. now ſhewed cauſe and contended, that it was a general principle of law, that wherever a perſon takes upon himſelf to diſpoſe of the goods of another without an authority ſo to do, it amounts to a converſion; and that the words "to his own uſe," though neceſſary to be inſerted in averring the converſion, have always received a liberal conſtruction; that it made no difference that the goods in this caſe were originally bailed to the Defendant, for that the Defendant by diſpoſing of them in a manner unauthorized by the agreement had determined the bailment, and become guilty of a converſion. They cited *Wilſon* v. *Chambers*, *Cro. Car.* 262. where the Court ſaid, "denying to deliver upon requeſt is a converſion;" and *Waldgrave* v. *Ogden*, 1 *Leon.* 224. *Cro. Eliz.* 219. S. C. where *Walmeſley* J. ſaid, "if a man find my garments and ſuffereth them to be eaten with moths by the negligent keeping of them no action lieth; but if he weareth my garments it is otherwiſe, for the wearing is a converſion." They urged that the Plaintiff was clearly entitled to ſome action; that had the injury ariſen from a mere non-feaſance on the part of the Defendant, the proper remedy would have been an action on the caſe, but that the poſitive act of the Defendant in delivering the prints to his agent in *India* without any authority ſo to do was ſufficient to ſupport an action of trover. *Anon*, 2 *Salk.* 655. *Syeds* v. *Hay*, 4 *Term Rep.* 260. where *Buller* J. ſaid, "If one man who is entruſted with the goods of another put them into the hands of a third perſon contrary to orders it is a converſion;" and *Youl* v. *Harbottle*, *Peake's N. P. Caſ.* 49. where Lord *Kenyon* ſaid, "I agree that when a carrier loſes goods by accident, trover will not lie againſt him, but when he delivers them to a third perſon and is an actor, though under a miſtake, this ſpecies of action may be maintained."

Shepherd Serjt. *contrà* was ſtopped by the Court.

Heath J.—I am not clear that in the preſent caſe there was any breach of the agreement. The Defendant does not agree to bring the prints home; he was authorized to ſell them for what they might fetch if not more than one guinea ſhould be offered for them ſeparately: and under this part of the agreement I do not ſee why he was not at liberty to leave them with an agent to be ſold. The conduct of the Defendant however, cannot amount to a converſion in any point of view. It is agreed that mere negligence is not ſufficient: now the conduct of the Defendant in not ſelling the prints in *India* was a mere non-feaſance. To ſupport an action of trover there muſt be a poſitive tortious act.

1801.
BROMLEY
v.
COXWELL.

ROOKE J.—In this caſe there was no agreement to bring the prints home. The Defendant left them in *India* judging for the beſt: and though he ordered the money to be remitted to himſelf, it is clear that this was done with no other view than to facilitate the payment of it to the Plaintiff. At all events it does not appear to me that there was any converſion.

CHAMBRE J.—It is not neceſſary to decide whether any action at all could be maintained under the circumſtances of this caſe; but the ſtrong inclination of my opinion is, that none could be maintained. The Defendant agrees to ſend ſome prints to *India*, and if they are ſold for more than one guinea each, the Defendant is only to account for them at that ſum. Then the Plaintiff agrees to take all which ſhall be returned without any charge to the Defendant: none are returned. The agreement concludes with a general authority, in caſe the prints do not ſell for a guinea each, to ſell them for whatever they may fetch. The Defendant not being able to ſell them at a guinea, leaves them with an agent to be ſold to the beſt advantage. It does not appear that any have been ſold. No act has been done. The agreement does not expreſs that the Defendant ſhall ſell the goods himſelf: it ſeems therefore that the delivery to his agent was within the terms of the agreement.

Per Curiam, Rule abſolute for entering a nonſuit.

May 13th.

PERKINS, Adminiſtrator, *v.* PETTIT and YALE.

If a Defendant in error, (the Plaintiff in the action) upon judgment being affirmed take in execution the body of the Plaintiff in error for the debt damages and coſts in error, he does not thereby diſcharge the bail in error; but may ſue them upon their recognizance.

SCIRE FACIAS on a recognizance of bail in error. The Defendants pleaded 1ſt, *Nul tiel record* of the recognizance. 2dly, *Nul tiel record* of the writ of *Scire facias* and return. 3dly, *Executionem non* "becauſe they ſay that to the ſaid ſuppoſed recognizance a certain condition was underwritten which condition (reciting that the Plaintiff had lately in his Majeſty's Court of *Common Bench* at *Weſtminſter* before Sir *James Eyre* Knight and his Brethren Juſtices of the ſaid Court by the conſideration and judgment of the ſaid Court recovered againſt *Jane Howes* a certain debt of 360 *l.* and alſo 27 *l.* 3 *s.* 6 *d.* for his damages which he had ſuſtained by occaſion of the detaining that debt whereof the ſaid *Jane Howes* had been convicted and that the ſaid *Jane* had ſued out of his Majeſty's Court of *Chancery* at *Weſtminſter* on the ſaid judgment his Majeſty's writ of Error teſted the 19th day of *May* in the 38th year of his reign directed to Sir *James Eyre* Knight Chief Juſtice of his Majeſty's Court of the *Bench* aforeſaid) was, that if the ſaid *Jane Howes* ſhould by herſelf or her ſufficient ſecurity proſecute the ſaid writ of Error with effect and alſo ſhould ſatisfy and pay unto the ſaid Plaintiff (if the ſaid judgment ſhould be affirmed or the ſaid writ of Error ſhould be diſcontinued in her default or ſhe ſhould be nonſuited therein) the debt and damages aforeſaid then already adjudged upon the ſaid judgment and all coſts and damages to be alſo awarded for the delay of execution of the ſaid judgment by means of the ſaid writ of Error then that recognizance ſhould be void and of no effect or elſe ſhould remain in full force and virtue as by the ſaid condition of the ſaid recognizance remaining of record in the ſaid Court of our ſaid Lord the King of the *Bench* may more fully appear And the ſaid Defendants further ſay that afterwards to wit in *Michaelmas* Term in the 39th year of the reign of our Lord the King the ſaid judgment was in all things affirmed by the Court of our Lord the King before the King himſelf the ſame Court then and ſtill being at *Weſtminſter* aforeſaid in the ſaid county of *Middleſex* and by the ſame Court a large ſum of money to wit the ſum of 16*l.* 10*s.* was adjudged to the ſaid *John* according to the form of the ſtatute in ſuch caſe made and provided for his damages coſts and charges which he had by occaſion of the delay of the execution aforeſaid by the pretence of the proſecution of the ſaid writ of Error as by record of the ſaid Judgment of Affirmance ſtill remaining in the ſame Court at *Weſtminſter* aforeſaid may more fully appear And the ſaid Plaintiff afterwards and before the ſuing forth of the ſaid ſuppoſed writs of *Scire facias* or either of them to wit on &c at &c ſued and proſecuted out of the ſaid Court of our Lord the King before the King himſelf the ſame Court then and ſtill being at *Weſtminſter* aforeſaid on the ſaid judgment of affirmance a certain writ of our Lord the King of *Capias ad ſatisfaciendum* againſt the ſaid *Jane Howes* directed to the Sheriff of *Middleſex* whereby the ſaid Sheriff was commanded that he ſhould take the ſaid *Jane* if ſhe ſhould be found in his bailiwick and her ſafely keep ſo that he might have her body before our ſaid Lord the King on the Morrow of *All Souls* then next following whereſoever he ſhould then be in *England* to ſatisfy the ſaid *John* as well the ſaid debt of

360*l.*

1801.

PERKINS *v.* PETTIT and YALE.

360*l.* as alſo the ſaid 27*l.* 3 *s.* 6 *d.* for his damages which he had ſuſtained by occaſion of the detaining that debt and alſo the ſaid 16*l.* 10 *s.* for his damages coſts and charges which he had by occaſion of the delay of the execution of the judgment aforeſaid by the pretence of the proſecution of the ſaid writ of Error brought by the ſaid *Jane* againſt the ſaid Plaintiff and upon the premiſes aforeſaid which writ after the iſſuing and before the return thereof to wit on &c at &c was duly delivered to *Charles Price* Eſquire and *Peter Melliſh* Eſquire then being Sheriff of the ſame County to be executed in due form of law and the ſaid Sheriff by virtue of the ſaid writ afterwards and before the return thereof and before the ſuing out of the ſaid writ of *Scire facias* or either of them to wit on &c at &c took and arreſted the ſaid *Jane* by her body and had and detained her in his cuſtody in execution at the ſuit of the ſaid Plaintiff for the cauſe aforeſaid for a long ſpace of time to wit from that time until the ſuing forth of the ſaid ſuppoſed writs of *Scire facias* and from thenceforth hitherto. And this &c. wherefore" &c.

Iſſue was joined on the two firſt pleas: and a general demurrer put in to the laſt.

Marſhall Serjt. was to have argued in ſupport of the demurrer; but *Shepherd* Serjt. being called upon by the Court to ſupport the plea, ſaid that he meant to contend that the condition of the recognizance was ſatisfied by the Plaintiff in error being taken in execution for the original debt and coſts together with the coſts of the writ of error; and mentioned the caſes of *Vigers* v. *Aldrich*, 4 *Burr.* 2482, and *Clarke* v. *Clement*, 6 *Term Rep.* 525 (*a*).

But *the Court* (conſiſting of HEATH, ROOKE, and CHAMBRE, Js.) were clearly of opinion that it was not an arguable point.

Judgment for the Plaintiff (*b*).

(*a*) See alſo *Jaques* v. *Withy*, 1 *Term Rep.* 557. and *Tanner* v. *Hague*, 7 *Term Rep.* 420.

(*b*) So bail in error cannot be relieved if the principal become bankrupt pending the writ of Error. *Southcote* v. *Braithwaite*, 1 *Term Rep.* 624.

DIXON *v.* DIXON.

May 16th.

A recognizance entered into by the bail in error without the principal is good.

If on a bond debt double the ſum ſecured by the bond be the ſum for which the bail bind themſelves in the recognizance in error it is ſufficient; though a further ſum be due for intereſt and coſts and nominal damages have been recovered.

THIS was an action of debt on a bond for 4000 *l.* conditioned for the payment of 2000*l.* A verdict having been found for the Plaintiff with one ſhilling damages for the detention of the debt, judgment was entered up for 4019 *l.* 11 *s.* 0 *d.* being the amount of the penalty with the addition of 1*s.* damages and 19 *l.* 10*s.* coſts. Upon this judgment the Defendant brought a writ of error, and a recognizance was entered into by two perſons as his ſureties binding each of them in the ſum of 4000 *l.* Notwithſtanding this writ of error the Plaintiff ſued out a *Fieri facias* indorſed to levy 2119*l.* 11*s.* being the amount of the ſum mentioned in the condition together with the damages and coſts added to 100 *l.* due by way of intereſt.

A rule *niſi* having been obtained for ſetting aſide this execution on the ground of its having iſſued pending a writ of error.

Beſt and *Praed* Serjts. now ſhewed cauſe, and objected to the recognizance upon two grounds, firſt, becauſe the Defendant himſelf had not entered into it together with his ſureties; ſecondly, becauſe it was not taken in a proper ſum. They relied upon the words of the ſtatute 3 *Jac.* 1. *c.* 8. which provides that no execution ſhall be ſtayed upon any writ of Error for the reverſing of any judgment given upon any obligation with condition for the payment of money only "unleſs ſuch perſon or perſons in whoſe names ſuch writ of Error ſhall be brought with two ſufficient ſureties ſuch as the Court ſhall allow of ſhall firſt before ſuch ſtay made be bound unto the party for whom any ſuch judgment ſhall be given by recognizance in double the ſum adjudged to be recovered by ſuch former judgment to proſecute the ſaid writ of Error with effect and alſo to ſatisfy and pay the debts damages and coſts adjudged upon the former judgment and all coſts and damages to be awarded for the ſame delaying of execution." With reſpect to the firſt point they contended that as the words of the ſtatute were poſitive that the plaintiff in Error ſhall enter into the recognizance with two ſureties, no length of practice to the contrary would authoriſe the Court to conſider thoſe words ſatisfied by a recognizance entered into by two ſureties without the Plaintiff in Error; and that the caſes of *Barnes* v. *Bulwer*, *Carth.* 121. *Goodtitle* v. *Bennington*, *Barnes* 75. and *Luſhington* v. *Doe*, *Barnes* 78. where recognizances entered into by ſureties only were held ſufficient were all caſes of ejectment, which do not depend on the ſtatute of *Jac.* 1, but on 16 and 17 *Car.* 2. *c.* 8. *ſ.* 3. which is differently worded from the former ſtatute as it only requires the Plaintiff in Error to be bound without ſpecifying whether with or without ſureties. On the 2d point they urged that as the ſtatute requires that the parties to the recognizance ſhall be bound in double the ſum adjudged, the recognizance in this caſe ought to have been taken in double the ſum of 4019*l.* 10*s.* and they referred to a manuſcript note (*a*) of one of the officers of the Court; or that even ſuppoſing according to the caſe of *Moor* v. *Lynch*, 1. *Wilſ.* 213. it was ſufficient to take the recognizance in double the debt really due, ſtill the intereſt ought to have been added to the ſum mentioned in the condition, which then would amount to 2100*l.*

Shepherd and *Bayley* Serjts. *contrà* as to both points relied on the invariable practice of the Court as well as on the caſes referred to by the other ſide, which they inſiſted muſt govern the preſent.

The Court (conſiſting of *Heath*, *Rooke*, and *Chambre*, Js.) were of opinion that as the practice had ſo long prevailed without objection it was now too late to overturn it; and that with reſpect to the 1ſt point they might without doing much violence to the ſtatute conſtrue the words *with ſureties* to mean *by ſureties.*

Rule abſolute.

(*a*) *Anon.* *May* 8th, 1796. Action on bond for money payable by inſtalments; judgment obtained and a writ of Error brought thereon; bail in error was only put in for double the ſum due, whereupon an application was made to ſet aſide the execution which had iſſued notwithſtanding the writ of Error and bail put in, merely becauſe the bail were not bound in double the penalty of the bond.—*Per Curiam.* There having been a failure of payment of the inſtalments the judgment is regular for the whole penalty and under the ſtatute 3 *Jac.* 1. *c.* 8. the bail in error ſhould have been for double the penalty and this application would have been more proper had it been to ſtay all proceedings on payment of the inſtalments due and all the coſts.

SOILLEUX *v.* HERBST (*a*).

May 16th.

If a bond of ſubmiſſion to arbitration between the truſtee of a wife and her huſband recite that a ſuit for ſeparation has been inſtituted between the huſband and wife in the Commons, and that in order to put an end to any conteſt about the terms of the ſeparation it has been agreed that all matters ſhould be referred to *J. S.* and either of the parties ſhould be "at liberty to apply to the Court" to make the "award a rule of Court," ſuch ſubmiſſion may be made a rule of the Court of Common Pleas under the 9 and 10 *W.* 3.

THIS was a rule obtained by *Marſhall* Serjt. calling on the obligor in a bond of ſubmiſſion to arbitration, to ſhew cauſe why the ſubmiſſion ſhould not be made a rule of Court.

(*a*) All the affidavits were by miſtake entitled in this manner, though no cauſe was pending in the Court.

Herbſt the obligor was truſtee for the wife of *Soilleux* the obligee. The bond recited that *Mary Soilleux* wife of *John Soilleux*, had lately inſtituted her ſuit and complaint in the Eccleſiaſtical Court at *Doctors' Commons*, for a ſeparation and divorce *a menſâ et thoro*, and in order to prevent further conteſt, controverſy, litigation, and diſputes whatſoever, as well touching the terms on which ſuch divorce ſhould be had, as alſo to terminate and put a final end and determination to the ſaid ſuit, and to any doubt, queſtion, conteſt, and diſpute, which might ariſe in reſpect of the children of the ſaid marriage, it had been propoſed by the ſaid *John Soilleux*, and agreed to by the ſaid *Mary Soilleux*, that the terms of ſuch ſeparation, and all matters in conteſt and diſpute between them ſhould be left to the conſideration, judgment, arbitration, final determination, and award of *J. S. W.* &c. and it was agreed, that either of the ſaid parties ſubmitting ſhould be at liberty to apply to the Court for making the ſaid award a rule of Court. The bond was conditioned for the performance of the award by the ſaid *Mary Soilleux*.

Lens Serjt. ſhewed cauſe and objected 1ſt, that in the recital of the bond it was not ſpecified to what Court the application ſhould be made, and that from the expreſſion "the Court," it could not be underſtood to be the intention of the parties that the application ſhould be made to this Court. 2dly, That the agreement being, that either of the parties might apply to have the award made a rule of Court, would not authorize them to apply to have the ſubmiſſion made a rule of Court; for which he cited *Harriſon* v. *Gundry*, 2 *Str.* 1178. as in point (*a*); 3dly, that as the matter of diſpute between the parties was only the ſubject of a ſuit in the Eccleſiaſtical Court, the ſtatute of 9 and 10 *W.* 3. *c.* 15. gave no authority to this Court to make the bond of ſubmiſſion a rule of Court, the ſtatute being expreſsly confined to "controverſies, ſuits, and quarrels, for which there is no other remedy but by perſonal action or ſuit in equity."

The Court (conſiſting of *Heath*, *Rooke*, and *Chambre*, Js.) overruled all the objections, and obſerved as to the firſt, that by the words of the ſtatute, the parties are at liberty to make the ſubmiſſion "a rule of any of His Majeſty's Courts of record, which they ſhall chooſe" and therefore the words uſed in the bond

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(*a*) Vide alſo *Anon.* 2 *Barnard* 163. *Runnington* Serjt. *amicus curiæ* ſaid, the caſe of *Gundry* v. *Harriſon* had been often overruled.

were ſufficient. As to the ſecond objection they were of opinion, that the caſe of *Gundry* v. *Harriſon* was intitled to very little credit, and as to the 3d, that the obligor being truſtee for the wife of the obligee, many cauſes of action at law, and many ſuits in equity might ariſe out of the diſputes ſtated in the recital of the bond.

Rule abſolute.

May 18th.

Moody, Aſſignee of the Sheriff *v.* Pheasant.

Final judgment may be entered upon a bail-bond without executing a writ of inquiry.

Bayley Serjt. applied to the Court for leave to enter up final judgment upon a bail bond, without executing a writ of inquiry, obſerving that although the practice had been otherwiſe, the Court of *King's Bench* had of late decided, that a writ of inquiry was unneceſſary in ſuch caſes.

The Court (conſiſting of *Heath*, *Rooke*, and *Chambre*, Js.) being of the ſame opinion, gave leave to enter up final judgment accordingly.

May 18th.

Bell *v.* Da Costa.

A Defendant who is under terms to plead iſſuably is not at liberty to take advantage of any objections upon ſpecial demurrer, of which he could not have availed himſelf upon a general demurrer. Plaintiff declared againſt the Defendant as acceptor of a bill of exchange, payable to certain perſons uſing the firm of Meſſrs. *M'Brair*, *Watſon*, and Co. Defendant pleaded, that the ſaid Meſſrs. *M'Brair*, *Watſon*, and Co. had accepted ſatiſfaction. Plaintiff replied, that the ſaid perſon ſo as aforeſaid, uſing the firm of Meſſrs. *M'Brair*, and Co. (leaving out the name of *Watſon*,) did not accept ſatiſfaction, and concluded to the country. *Semb.* that this variance could only be taken advantage of on ſpecial demurrer.

Assumpsit on a bill of exchange againſt the acceptor. The declaration deſcribed the bill to be payable to certain perſons uſing the firm of Meſſrs. *M'Brair*, *Watſon*, and Co. and averred, that the ſaid perſons ſo uſing the firm of Meſſrs. *M'Brair*, *Watſon*, and Co. as aforeſaid, indorſed it to the Plaintiff. Plea, that before the indorſement, the ſaid Meſſrs. *M'Brair*, *Watſon*, and Co. took and accepted two other bills in full ſatiſfaction. The Plaintiff replied, that the ſaid perſons ſo as aforeſaid uſing the firm of Meſſrs. *M'Brair*, and Co. did not accept the ſaid bills in ſatiſfaction, &c. concluded to the country, and added the *ſimiliter*. The Defendant ſtruck out the *ſimiliter*, and put in a ſpecial demurrer, aſſigning for cauſes, that the Defendant in his plea had averred, that the ſaid Meſſrs. *M'Brair*, *Watſon*, and Co. had taken and accepted bills of exchange, and that the Plaintiff in his replication alleged, that the ſaid perſons ſo as aforeſaid uſing the firm of Meſſrs. *M'Brair*, and Co. did not take and accept them, that the Plaintiff had not tendered any averment on which iſſue could be taken by the Defendant without departure from his plea, and that the Plaintiff had attempted to put in iſſue a ſubject matter foreign to the Defendant's plea.

A rule having been obtained calling upon the Defendant to ſhew cauſe why the Plaintiff ſhould not be at liberty to proceed to the trial of the iſſue, notwithſtanding the demurrer put in by the Defendant, on the ground of the latter having been under terms to plead iſſuably, rejoin gratis, and take ſhort notice of trial,

Beſt Serjt. ſhewed cauſe and contended, that the terms impoſed did not oblige the Defendant to wave any good ground of demurrer, but only not to demur for delay, and cited the caſe of *Dewey* v. *Sopp*, 2 *Str*. 1185.

Shepherd and *Bayley* Serjts. *contrà* cited *Berry* v. *Anderſon*, 7 *Term Rep*. 530. (*a*) where a ſpecial demurrer was held not to be an iſſuable plea, as not going to the merits, and the party demurring was compelled to ſtrike out the ſpecial cauſes of demurrer.

The Court (conſiſting of *Heath*, *Rooke*, and *Chambre*, Js.) ſaid the true queſtion in theſe caſes was, whether the objections were ſuch as might be relied on upon a general demurrer, and accordingly made the rule abſolute without payment of coſts, at the ſame time giving the Plaintiff leave to amend without payment of coſts.

(*a*) See alſo the caſes there cited *in notis*.

WATERHOUSE *v.* SKINNER.

May 18th.

If *A.* agree to buy of *B.* and *B.* to ſell to *A.* goods at a certain price, to be delivered between ſuch a day and ſuch a day; and *B.* fail to deliver the goods within the time, it is ſufficient for *A.* in declaring upon the contract to aver, that he was during all the time, and ſtill is ready and willing to receive and pay for the goods; without making any allegation of an actual tender and refuſal.

*A*SSUMPSIT. The declaration ſtated that the Plaintiff, at the inſtance and requeſt of the Defendant, bargained with the Defendant to buy of him, and the Defendant agreed to ſell to the Plaintiff a quantity of oats at the price of 21 ſhillings per quarter, to be delivered any time between *Michaelmas* day 1799 and *Lady* day 1800: and in conſideration thereof the Plaintiff under-

1801.

WATER-HOUSE v. SKINNER.

took to accept and receive the oats, and pay for them at the above mentioned price, and the Defendant undertook to deliver them ſome time between the above-mentioned days; "and although the ſaid Defendant afterwards, to wit on, &c. at, &c. did in part performance of his ſaid promiſe deliver to the Plaintiff a part, to wit, five quarters of the ſaid oats, and although the time for the delivery of the reſidue of the ſaid oats to the ſaid Plaintiff according to the Defendant's promiſe aforeſaid is long ſince elapſed, and the Plaintiff was for and during all that time, and ſtill is ready and willing to accept and receive the reſidue of the ſaid oats, and to pay for the ſame at the rate or price aforeſaid, to wit at, &c." Yet Defendant not regarding, &c. had not delivered, &c. but had refuſed, &c. The Defendant pleaded *non-aſſumpſit*, and a verdict having been found for the Plaintiff, a rule *Niſi* was obtained in *Michaelmas* Term laſt, calling upon him to ſhew cauſe why judgment ſhould not be arreſted, becauſe it was not averred in the declaration, that he had performed his part of the contract by tendering the price of the corn.

Shepherd and *Beſt* Serjts. ſhewed cauſe; and diſtinguiſhed this caſe from that of *Morton* v. *Lamb*, 7 *Term Rep.* 125. by obſerving, that in that caſe there was no averment of the Plaintiff's readineſs to receive and pay for the corn; which is all that is neceſſary to ſupport the action, as appears from the words of Lord *Kenyon* in *Morton* v. *Lamb*, that "where two concurrent acts are to be done, the party who ſues the other for non-performance muſt aver, that he has performed, *or was ready to perform* his part of the contract."

Marſhall Serjt. in ſupport of the rule contended, that the meaning of the contract was, that the money ſhould be paid on the delivery of the corn; that the payment and delivery therefore were concurrent acts, and conſequently that neither party could maintain an action againſt the other without averring performance on his part, or a tender and refuſal; that the averment in this declaration of the Plaintiff's readineſs to pay was introduced in order to avoid the neceſſity of proving an actual tender, without which the Plaintiff was not entitled to maintain his action. He cited *Callonel* v. *Briggs*, 1 *Salk.* 112. and *Pordage* v. *Cole*, 1 *Saund.* 320 (*a*).

Cur. adv. vult.

(*a*) See the edition of *Saunders* by Mr. Serjt. *Williams*, where in note 4 to the above caſe the learning upon this ſubject is very fully collected and commented upon.

On this day the opinion of the *Court* (preſent *Rooke* and *Chambre*, Js.) was delivered by

HEATH J.—The only doubt which we entertained on this caſe aroſe from the deciſion of the Court of *King's Bench* in *Morton* v. *Lamb*. But that deciſion has been explained by the ſubſequent caſe of *Rawſon* v. *Johnſon*, 1 *Eaſt*. 203. where in a declaration on a contract ſimilar to the preſent an averment of the Plaintiff's readineſs and willingneſs to pay for the article to be delivered by the Defendant, without any allegation of an actual tender of the money was held ſufficient. With the determination of this laſt caſe we are perfectly ſatisfied, and therefore think, that the judgment ought not to be arreſted.

Per Curiam, Rule diſcharged.

THE END OF EASTER TERM.

SHORTLY after the cloſe of the term, *Lord Eldon*, who had continued to hold the office of Lord Chief Juſtice of this Court, together with that of Lord High Chancellor, and had occaſionally preſided here in order to make his Report on motions for new trials where the cauſes had been tried before him, reſigned the former ſituation.

The Right Honourable Sir *Richard Pepper Arden*, Knight, (having reſigned the ſituation of Maſter of the Rolls,) was appointed to ſucceed him, and was created a peer by the title of Baron *Alvanley* of *Alvanley* in the county palatine of *Cheſter*.

Sir *William Grant*, Knight, ſucceeded Lord *Alvanley* as Maſter of the Rolls, and was ſworn of His Majeſty's Moſt Honourable Privy Council.

In *Hilary* Term laſt *William Mackworth Praed*, of *Lincoln's Inn*, Eſquire, was called to the degree of Serjeant at Law. His motto was "*foederis æquas dicamus leges*."

[illegible] above mentioned price, and the D[illegible]

[illegible]

[illegible] writ &c. [illegible] had refused, &c. The Defendant [illegible], and a verdict having been found for the Plaintiff, a rule Nisi was obtained in Michaelmas Term last, calling upon [illegible] to shew cause why judgment should not be arrested, because [illegible] was not averred in the declaration, that he had performed [illegible] of the contract by tendering the price of the corn.

Shepherd and *Best* Serjts. shewed cause; and distinguished [illegible] [illegible] to be done, one party may sue the other for [illegible] [illegible] maintain an action against the other without averring [illegible] in order to avoid the necessity of proving an actual tender [illegible] out which the Plaintiff was not entitled to maintain his [illegible] [illegible] cited *Callonel* v. *Briggs*, 1 *Salk.* 112. and *Porter* v. [illegible] 1 *Saund.* 320 (a).

Cur. adv. vult.

(a) See the edition of *Saunders* by Mr. Serjt. *Williams*, where in notes to the [illegible] the learning upon this subject is very fully collected and commented upon.

1801.

CASES

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

In the EXCHEQUER CHAMBER,

AND

In the HOUSE OF LORDS,

IN

Trinity Term,

In the Forty-firſt Year of the Reign of GEORGE III.

PARRY *v.* FRAME.

June 8th.

TROVER for an indenture of leaſe.

The Defendant having agreed to purchaſe of the Plaintiff for 75 *l.* the remainder of a term of twenty years in a houſe, whereof eight years were unexpired, the latter delivered up to him the indenture of leaſe for the purpoſe of enabling him to get an aſſignment made out, and alſo the key of the houſe. After this the Defendant having made a bargain with the original landlord for an enlargement of the term, and having ſome diſpute with the Plaintiff reſpecting certain fixtures which the Plaintiff's undertenant had taken off the premiſes, refuſed to pay the full price agreed upon, claiming to make a deduction for the articles taken away; and alſo declined to accept an aſſignment of the term from the Plaintiff, alleging that it was rendered unneceſſary by his ſubſequent bargain with the original landlord. Upon this the Plaintiff required that the leaſe ſhould be returned, which was refuſed: but

A. having agreed to purchaſe of *B.* the remainder of a term, the latter delivered to him the leaſe in order that he might get an aſſignment made out; *A.* then obtained an enlargement of the term from the original landlord and refuſed to accept an aſſignment or pay the full price agreed on, becauſe *B.*'s undertenant had removed ſome fixtures. Held that *B.* might inſiſt on *A.* accepting the aſſignment, and after demand and refuſal of the leaſe might maintain trover for it.

no demand was ever made of the purchaſe-money. It appearing at the trial before *Chambre* J. at the Sittings after laſt *Eaſter* Term, that the Defendant at the time of the agreement being entered into with the Plaintiff was aware that the undertenant was to take away the fixtures in diſpute, but that the Plaintiff had alſo taken away ſome articles to which he had no right, the Jury deducted the amount of the latter articles from the price agreed upon, and found a verdict for 73 *l.* 19 *s.*

Clayton Serjt. now moved for a Rule, calling on the Plaintiff to ſhew cauſe why a nonſuit ſhould not be entered, contending, that under the circumſtances of this caſe trover was not maintainable, for that the Defendant had an intereſt in the leaſe, and a lien upon it; that although a legal aſſignment of the leaſe had not actually been made, yet that a court of equity would have enforced the Defendant's title to it, by compelling a ſpecific performance of the agreement between the parties; that the Defendant therefore having an equitable title to the leaſe could not be guilty of a converſion by retaining it; and that the two circumſtances which are neceſſary to ſupport an action of trover did not concur in this Plaintiff, namely the right of property and the right of poſſeſſion. He cited *Gordon* v. *Harper*, 7 *Term Rep.* 9.

But *the Court* was of opinion that although the Defendant on payment of the purchaſe money and taking an aſſignment would be entitled to retain poſſeſſion of the indenture of leaſe, yet that the Plaintiff had a right to inſiſt upon an aſſignment being made out with covenants to protect himſelf, and that therefore, as the Defendant had refuſed to accept an aſſignment or return the leaſe, the action of trover was maintainable.

Clayton took nothing by his motion.

June 9th.

WADDINGTON and Others *v.* BRISTOW and Others Executors of SIMMONS.

A written agreement for the ſale of all the hops which ſhall be grown upon a certain number of acres of land, to be delivered in pockets at a certain place, cannot be given in evidence unleſs ſtamped with an agreement ſtamp: ſuch an agreement not being within the exception in the 23 *Geo.* 3. *c.* 58. *ſ.* 4. reſpecting agreements for the ſale of goods, wares, and merchandiſes.

ASSUMPSIT. The declaration ſtated that the teſtator in his lifetime was poſſeſſed of twenty-two acres of land, ſituate, &c. on which ſaid land certain hops were then growing, and that the ſaid teſtator being ſo poſſeſſed thereof, the Plaintiffs bargained for and agreed to buy of the ſaid teſtator, and the ſaid teſtator agreed

1801.
Waddington and Others *v.* Bristow and Others.

to ſell to the ſaid Plaintiffs all the hops then growing on the ſaid land at the rate of 10*l.* *per* hundred weight, to be therefore paid by the Plaintiffs to the ſaid teſtator, and to be delivered in pockets by the ſaid teſtator to the Plaintiffs at *W.* in the county of *Kent*, and in conſideration thereof and alſo in conſideration that the Plaintiffs had undertaken to accept and pay for the hops at the rate aforeſaid, the teſtator undertook to deliver the hops to the Plaintiffs at the place and in the manner aforeſaid in a reaſonable time next after the ſame ſhould be pulled and gathered; that the hops were afterwards pulled and gathered and amounted to two hundred weight, and that although a reaſonable time had elapſed and the Plaintiffs were willing to receive them, yet that neither the teſtator nor the Defendants had delivered them. There was a ſecond count only varying from the firſt by ſtating, that the teſtator agreed to ſell to the Plaintiffs all the hops then growing on twenty-two acres of land of the teſtator, without ſaying where the land was ſituate. The Defendants pleaded the general iſſue.

This cauſe was tried before *Hotham* Baron, at the *Maidſtone* Spring Aſſizes, when the following agreement was produced on the part of the Plaintiffs: "Agreed this 13th of *November* 1799 to give the undermentioned gentlemen at the rate of 10*l.* *per* 100 weight, for the quantities of hops as attached to their reſpective names, to be in pockets and delivered at *Whitſtable*.

(Signed) *Henry Simmons.*
Wm. Francis, &c. &c.
(Here followed ſeveral other ſignatures.)

Wm. Francis, all his growth about 23 acres.
Henry Simmons, do. 22.
(Here followed ſeveral names with their reſpective quantities.)

(Signed) *Sam. Ferrand*, *Waddington*, and Co."

It was proved that it was cuſtomary in *Kent* for purchaſers of hops to enter into agreements while the hops are growing for the delivery at a future time, and that when no particular time is ſpecified in ſuch agreements for the delivery, it is underſtood to be within a reaſonable time after the hops are picked and dried. On the production of the above agreement it was objected that it could not be received in evidence inaſmuch as it was not ſtamped, and the learned Judge being of that opinion, the Plaintiffs were nonſuited.

A rule

1801.
WADDINGTON and Others
v.
BRISTOW and Others.

A rule *niſi* for ſetting aſide the nonſuit having been obtained in the courſe of laſt term,

Runnington Serjt. was proceeding on this day to ſhew cauſe, contending that the agreement in queſtion fell within the words of the 23 *Geo.* 3. *c.* 58. *ſ.* 1. which impoſes a duty upon every piece of paper upon which any agreement ſhall be written, whether the ſame ſhall be only the evidence of the contract, or obligatory upon the parties from being a written inſtrument, and that it did not fall within the exception in the 4th ſection of the ſame act reſpecting agreements made for or relating to the ſale of any goods, wares, or merchandiſes; when the other ſide was called upon by the Court to ſupport the rule.

Accordingly *Shepherd* Serjt. argued that the agreement in queſtion fell within the exception in the 4th ſection of the act; for that although the quantity of hops to be delivered was meaſured by the number of acres in the poſſeſſion of the Defendant's teſtator, yet that the hops at the time of the delivery were to be in the condition of goods, wares, and merchandiſes; that this caſe was not like an agreement for the ſale of corn ſtanding on the ground where the purchaſer is to reap the corn, ſince the ſubject matter of the contract in that caſe cannot be conſidered as goods, wares, and merchandiſes, at the time when it comes into the poſſeſſion of the purchaſer, whereas in the preſent inſtance it would have been a breach of the contract, if the ſeller had omitted to deliver them in the condition of goods, wares, and merchandiſes, that is, gathered, dried, and pocketed; that the circumſtance of the agreement being made before the goods were in *eſſe*, could not take it out of the exception, for that if ſuch were its effect, every agreement to deliver any article of what kind ſoever at a future time, where the article is not in exiſtence at the time of the contract, muſt alſo be deemed not within the exceptions; as if a wine-merchant ſhould undertake to deliver a certain quantity of wine in the enſuing year of the vintage of the current year.

Lord ALVANLEY Ch. J.—By this contract the Defendant's teſtator undertook to ſell to the Plaintiffs the whole produce of twenty-two acres in his poſſeſſion, and if he had ſold one buſhel to any other perſon he would have been liable to an action. He agreed to ſell the whole produce of the land in a certain ſtate: the firſt term of the agreement is, that he will ſell the whole produce of the land, and the ſecond, that it ſhall be in a certain ſtate at the time of delivery. It is therefore an agreement for the ſale of goods, wares, and merchandiſe, and ſomething more. I think the agreement is not within the exception of the ſtatute.

HEATH J.—It appears to me that the ſubject-matter of this agreement muſt be taken with reference to the time at which the contract was made. Now at that time the hops did not exiſt in the ſtate of goods, wares, and merchandiſe.

ROOKE J.—The object of the Legiſlature in introducing the exception of the 4th ſection was to prevent the duty which had been impoſed by the 1ſt ſection upon all agreements generally, from impeding ordinary commercial tranſactions. But the ſubject of the preſent agreement is a ſpeculative bargain relative to things not *in eſſe* at the time when the contract was made. It does not appear to me therefore to fall within the meaning of the exception.

CHAMBRE J.—There is a little ambiguity in the terms of this agreement, but that has been cleared up by the parol teſtimony. Indeed the declaration puts the matter beyond all doubt, for it ſtates the contract to be for the ſpecific produce of twenty-two acres of land alleged to be in the poſſeſſion of the vendor. Now the ſtatute only exempts contracts for the ſale of goods, wares, and merchandiſes. But this contract gives the vendee an intereſt in the whole produce of that part of the vendor's farm, which conſiſts of hop-grounds. If the vendor had grubbed up the hops, or had refuſed to gather or dry them, it would have been a breach of the contract. Though I admit that a contract for the ſale of ſo many hops as twenty-two acres might produce, to be delivered at a diſtant day, might fall within the exemption of the act, notwithſtanding the hops were not in the ſtate of goods, wares, and merchandiſes, at the time of the contract made, yet I cannot think the preſent agreement within that exemption, ſince it gives an intereſt to the vendee in the produce of the vendor's land.

Rule diſcharged.

Ex parte MOTLEY *et* UXOR.

June 11th.

The Court refuſed to amend a fine, paſſed two years back, by altering the ſurnames of the Deforciants, though it was ſworn that a wrong name had been inſerted by miſtake.

WILLIAMS Serjt. applied to the Court to amend a fine by altering the ſurnames of the Deforciants in the writs of covenant and dedimus poteſtatem, and in the præcipe and concord acknowledged by

1801.

Ex Parte Motley et Ux.

by them, and at the ſeveral offices through which they had paſſed, from *Wood* to *Motley;* and that the chirographer ſhould be ordered to deliver up ſuch writs, &c. for the above purpoſe. He made this application upon an affidavit of the attorney who was employed to paſs the fine in the year 1798, and of the Deforciants themſelves, the former of whom ſtated, that at the time he was employed to paſs the fine, and through the whole of the tranſaction, he underſtood the names of the Deforciants to be *Wood*, and accordingly inſerted that name inſtead of *Motley*, which he now found to be their real names, in the writ of covenant, and that they being illiterate perſons only put their mark, and did not diſcover the miſtake; and the deforciants ſtated that the fine was read over to them, and they underſtood it, but did not diſcover the miſtake which had been made with reſpect to their names.

Lord Alvanley Ch. J.—This is an application to amend a fine, by inſerting the names of *Motley* and wife inſtead of *Wood* and wife. It is not ſworn that the parties at the time the fine was paſſed were as well known by one name as the other, or even that they were known by the name of *Wood* at all; and we are deſired to make the amendment without any reaſon given why one name was put for the other. The conſequences of ſuch an amendment muſt be obvious to every body. Suppoſe an ejectment brought, and a ſearch made for a fine and none found; and then when the parties come to trial a fine is produced which eſcaped the ſearch, becauſe the name has been changed. Theſe amendments ought not to be made, except in caſes where the alteration is of ſuch a nature as that no one can be miſled by it. Indeed I will go further and ſay, that if the Court of *Common Pleas* had allowed ſuch an amendment as is now applied for, I, as Maſter of the Rolls, would not have granted a new writ of covenant.

The other Judges concurring,

Williams took nothing by his motion (*a*).

(*a*) Vide *Croſs* v. *Pead, ante*, vol. i. p. 137. and the caſes there cited: alſo *Pearſon* v. *Pearſon*, 1 *H. Bl.* 73. *Wynne* v. *Wynne*, 7 *Mod.* 492. 506. *Wheeler* v. *Hill, poſt. Mich. T. Nov.* 24. *Dowſe* v. *Lloyd, poſt. Mich. T. Nov.* 26. and *Milbanke* v. *Jolliffe*, cited, *ibid. in notis.*

1801.

Mills and Others *v.* Ball.

June 12th.

A. living at *N.* in *Devonſhire*, ordered goods of *B.* in *London*, who ſent them by ſhip *viâ Exeter*, conſigned to *A.* and adviſed him thereof. On their arrival at *Exeter* they were delivered to *C.* a wharfinger, who received them on *A.*'s account, and paid the freight and charges; after their arrival *A.* wrote to *B.* informing that in conſequence of his affairs being deranged he ſhould not take the goods, and telling him that they were at *Exeter*; at this time *A.* had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt. *B.* applied to *C.* for the goods, and tendered him the freight and charges due; upon which *C.* promiſed not to deliver them out of his cuſtody, but afterwards did deliver them to the aſſignees of *A.* **though indemnified by *B.* Held 1ſt, that *B.* had a right to ſtop the goods in the hands of *C.*; and 2dly, that he might maintain trover for them againſt *C.***

This was an action of trover for one caſk of madder and one cheſt of indigo; to which the Defendant pleaded the general iſſue. The cauſe came on to be tried before Lord *Eldon* Ch. J. at the Sittings at *Guildhall* after laſt *Hilary* Term, when a verdict was entered for the Plaintiffs with 111*l.* 7*s.* 3*d.* damages, and 40*s.* coſts, ſubject to the opinion of this Court upon the following caſe: *Joſias Gard* a trader of *North Tawton*, in the county of *Devon*, about twenty-five miles from *Exeter*, on the 4th of *July* 1799, by letter to the Plaintiffs, who were dry ſalters in *London*, ordered the goods which were the ſubject of this action to be ſent to him. The Plaintiffs accordingly on the 6th of *July* 1799 ſent the goods, which were of the value of 111*l.* 7*s.* 3*d.* by the ſhip *Lively*, conſigned to *Gard*, and ſent a letter of advice to him incloſing the invoice, dated the 6th of *July* 1799, which letter *Gard* received in courſe, and the goods on their arrival at *Exeter* were delivered to the Defendant, who was a wharfinger there and received them on *Gard*'s account, and paid the freight and charges with which he debited *Gard*, and if any accident had happened to the goods before the receipt of the following letter the Plaintiffs would have called on *Gard* for payment. On the 16th *September* 1799, ſoon after their arrival, *Gard* wrote the following letter to the Plaintiffs Meſſrs. *Smith*, *Mills*, *Berkett*, and Co. *Northtawton*, 16th *September* 1799. "Sirs,—As ſome diſagreeable matters have recently taken place in my concerns, I have thought proper to leave the madder and *Eaſt India* indigo which I lately gave you an order for on your account. It is arrived ſafe at *Exeter*, ſo you will pleaſe to ſell the ſame to any of your correſpondents there, as I would wiſh to do by you as I would wiſh to have done by myſelf. I am very truly, Sirs, your obedient ſervant, *Joſias Gard*. The goods are at the wharfingers' office, marked *Lively*, *R. Mather*." In conſequence of this letter the Plaintiffs wrote to their agent at *Exeter* to ſtop the goods in the poſſeſſion of the Defendant, and on the 20th of *September* the Plaintiffs' agent went to the Defendant, in whoſe warehouſe the goods then were, and tendered him his freight and charges and demanded the goods on the behalf of the Plaintiffs. The Defendant ſaid (as the fact was) that ſome of *Gard*'s creditors had been there before to demand them, but he had refuſed to deliver them, hearing that *Gard* had ſtopped payment. He then promiſed not to deliver them out of his cuſtody till he was certain of a ſafe delivery. On the 2d of *October* the demand was repeated by the Plaintiffs' agent and a bond of indemnity left with the Defendant to indemnify him againſt any claim that might be made from any other perſon. On the 23d of *September* a commiſſion of bankrupt iſſued againſt *Gard*, who was ſubject to the bankrupt laws, indebted to the petitioning creditors in a ſum ſufficient to ſupport the commiſſion, and had committed an act of bankrupty on the 8th of *September* 1799. On the 1ſt of *October* 1799 he was duly declared a bankrupt, and on the 19th of *October* 1799 aſſignees of his effects and eſtate were duly choſen and an aſſignment executed. On the 3d of *November* the Defendant delivered the goods to the aſſignees, who ſold them for 103*l.* 7*s.*; the charges amounted to 3*l.* 19*s.* The queſtions for the opinion of the Court were, whether the Plaintiffs were entitled to recover? and if they were, what damages? whether 111*l.* 7*s.* 3*d.* or 103*l.* 7*s.*, or 99*l.* 17*s.*? If the Court ſhould be of opinion with the Plaintiffs, the verdict to ſtand for ſuch ſum as they ſhould direct; if for the Defendant, a nonſuit to be entered.

Beſt Serjt. for the Plaintiffs. The queſtion is, whether the Plaintiffs under the circumſtances of this caſe were entitled to ſtop the goods *in tranſitu?* The general rule is, that where the vendee becomes inſolvent the vendor has a right to ſtop the goods at any time before they come into the actual poſſeſſion of the vendee. In *Lickbarrow* v. *Maſon*, 2 *Term Rep.* 71. Mr. Juſtice *Aſhhurſt* ſays, "where the delivery is to be at a diſtant place, as between the vendor and vendee, the contract is ambulatory till delivery, and therefore in caſe of the inſolvency of the vendee in the mean time, the vendor may ſtop the goods *in tranſitu.*" Now at the time when theſe goods were demanded by the Plaintiffs, they had not arrived at their journey's end: for they had only reached *Exeter*, and were to be carried on from thence, and delivered to the vendee at *North Tawton*. The caſe of *Hodgſon* v. *Loy*, 7 *Term Rep.* 440. is a decided authority in the Plaintiffs' favour. Indeed that caſe is much ſtronger than the preſent, ſince the initials of the vendee had been marked upon the articles in diſpute previous to the ſtoppage *in tranſitu*, and they were delivered to a carrier nominated by the vendee: neither of which circumſtances occur in this caſe. So in the caſe of *Stokes* v. *La Riviere*, cited 3 *Term Rep.* 466, and 7 *Term Rep.* 443. the goods were ſent by the particular conveyance appointed by the conſignee: and in *Hunter* v. *Beal*, cited 3 *Term Rep.* 466. the goods in queſtion were ſent to the Defendant, who was an innkeeper, directed to the conſignees, and while in his hands he received directions from the conſignees to ſhip them, and was only prevented from ſo doing becauſe he arrived too late at the quay with the goods; yet in both theſe caſes the conſignees were held entitled to ſtop the goods *in tranſitu*. And in *Hunt* v. *Ward*, cited 3 *Term Rep.* 467. where goods were ſent by order of the vendor to a packer, the packer was conſidered as a middle man, and the vendor was held to have a right to ſtop the goods. If the Court ſhould be of opinion that the Plaintiffs are entitled to ſucceed, the only remaining queſtion will be, what damages the Plaintiffs ſhall recover? Whether 111*l.* 7*s.* 3*d.* the value of the goods, 103*l.* 7*s.* the ſum for which they were ſold, or 99*l.* 17*s.* the ſum for which they ſold after deducting the charges?

Here the Court expreſſed themſelves clearly of opinion that the Plaintiffs were only entitled to the ſmaller ſum.

Shepherd Serjt. *contrà*. The letter of the 16th of *September* 1799, being written to the Plaintiffs by the bankrupt after the act of bankruptcy, can have no effect in the caſe, as it cannot operate to reſcind the contract. *Barnes* v. *Freeland*, 6 *Term Rep.* 80. *Smith* v. *Field*, 5 *Term Rep.* 402. in which latter caſe the Court, referring to a caſe of *Salte* v. *Field*, 5 *Term Rep.* 211. take the diſtinction that though before the act of bankruptcy the vendee may reſcind the contract, yet that after that time he cannot. The principal queſtions therefore in this caſe are, whether the claim made amounted to a ſtoppage, and whether at the time they were claimed they were ſtill *in tranſitu*? It is true that the doctrine laid down by Lord *Hardwicke* in *Snee* v. *Preſcot*, 1 *Atk.* 250. "that a conſignor may get the goods back again by any means, provided he does not ſteal them," is very ſtrong. But in that caſe as well as in all the caſes ſince, in which that doctrine has been recogniſed, the goods have been actually ſeized by the conſignor before they have come into the poſſeſſion of the conſignee; whereas in this caſe the vendor was not able to get them

1801.
Mills and Others v. Ball.

out of the wharfinger's hands into his own poſſeſſion, and is now claiming to have a right of action againſt the wharfinger for not delivering them. Had the wharfinger delivered the goods to the Plaintiffs on their demand, perhaps they would have been entitled to retain them; but Lord *Eldon*, when this cauſe was tried, ſeemed to entertain ſome doubt as to their right to ſue the wharfinger. Though if the Plaintiffs had put their mark upon the goods while in the warehouſe of the wharfinger, or if the wharfinger had agreed to hold them for the Plaintiffs, ſuch circumſtances might have amounted to a ſtoppage; ſtill it may be very queſtionable whether a mere notice to the wharfinger of a right to the goods is tantamount to a ſtoppage. In conſidering whether the goods were *in tranſitu* at the time the notice was delivered to the wharfinger, it may be obſerved that in all the caſes on this ſubject expreſſions have been uſed which muſt be deemed figurative; ſuch as that the goods muſt have come to the "corporal touch" of the conſignee, which Lord *Kenyon* in *Ellis* v. *Hunt*, 3 *Term Rep*. 468. allows to be a figurative expreſſion, and that they muſt have come "to their journey's end," which if ſtrictly true would do away the authority of *Ellis* v. *Hunt*. Now here the wharfinger muſt be deemed the agent of the bankrupt, ſince he received the goods on his account and debited him with the freight and charges.

Lord Alvanley Ch. J. The caſe before the Court is ſhortly this. *Gard* being a trader at *North Tawton*, gives orders to the Plaintiffs to ſend the goods in queſtion to him from *London*, but does not direct that they ſhall be ſent by any particular ſhip; his orders were that they ſhould be ſent to him at *Exeter* to be forwarded to *North Tawton*. They were accordingly ſhipped, arrived at *Exeter*, and were put into the hands of a wharfinger to be forwarded to their journey's end. In the books of the wharfinger they were put to the account of *Gard* as the perſon to whom they were directed, and he was conſidered as the wharfinger's paymaſter. In this ſtate of things the letter of the 16th *September* was received by the Plaintiffs, the meaning of which I take to be this; the vendee ſays, "my ſituation is ſuch that I will not receive the goods, and you may take them back again if you think proper." The Plaintiffs immediately on the receipt of this letter ſent to the wharfinger and forbade him to deliver them according to the direction. The wharfinger promiſed not to deliver them till he could do ſo with ſafety, notwithſtanding which he afterwards delivered them to the aſſignees of *Gard*. The queſtion is whether the goods in the hands of the wharfinger were in ſuch a ſituation that the vendors could ſtop them? The caſes cited for the Plaintiffs have eſtabliſhed that where there is a contract for the ſale of goods, and a delivery has been made to a middle man, who is merely the vehicle between the buyer and ſeller, the latter, in caſe of the inſolvency of the former, may ſtop them at any time before they have arrived in ſuch a ſtate as to be in the actual or conſtructive poſſeſſion of the buyer. The only queſtion is, whether theſe goods are to be conſidered as having been in the hands of a middle man, or as having been taken in the poſſeſſion of the perſon for whom they were ultimately intended? If in the courſe of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exerciſe any act of ownerſhip over them, he thereby reduces the goods into poſſeſſion; and puts an end to the vendor's right to ſtop them. So, though it has been ſaid that the right of ſtoppage continues until the goods have arrived at their journey's end, yet if the vendee meet them upon the road and take them into his own poſſeſſion, the goods will then have arrived at their journey's end with reference to the right of ſtoppage (*a*). I am of opinion that the wharfinger in this caſe not having been particularly employed by the vendee, is to be conſidered as a middle man. And it has almoſt been admitted in the argument, that if the Plaintiffs could have got the goods into their poſſeſſion they would have had a right to keep them. But then another queſtion ariſes, *viz.* admitting that the Plaintiffs would have had a right to

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(*a*) But in a caſe of *Holſt* v. *Pownall*, and another, 1. *Eſp. N. P. Caſ.* 240. where a cargo conſigned to a perſon at *Liverpool* was on the arrival of the ſhip there taken poſſeſſion of by the aſſignees of the conſignee who had become bankrupt; and the ſhip was afterwards obliged to perform quarantine, and during that quarantine was claimed by the conſignor, Lord *Kenyon* is reported to have ruled that the conſignor had a right to the goods, ſaying that "in order to give the conſignee a right to claim by virtue of poſſeſſion, it ſhould be a poſſeſſion obtained by the conſignees on the completion of the voyage; that the caſe put by the Defendant's counſel, that the conſignee had a right to go out to ſea to meet the ſhip could not be ſupported, as it might go the length of ſaying that the conſignee might meet the veſſel coming out of the port from whence ſhe had been conſigned, and that that ſhould diveſt the property out of the conſignor and veſt it in himſelf; which was a poſition not to be ſupported, as there would then be no poſſibility of any ſtoppage *in tranſitu* at all." It is added in the report, that the Court of *King's Bench* on a motion for a new trial confirmed the opinion delivered by Lord *Kenyon* at *Niſi Prius*.—*Quære*, whether there be any diſtinction between carriage by ſea and carriage by land upon this point: for it may be obſerved that in the former caſe the maſter by ſigning the bill of lading agrees with the conſignor to deliver the goods *at* the deſtined port; whereas in the latter, no ſuch expreſs agreement is entered into between the vendor and the carrier.

retain the goods had they got them into their own poſſeſſion, whether they have any right of action to recover them out of the hands of the middle man? I am very far from wiſhing that it ſhould be underſtood that an action may be brought by the perſon entitled to ſtop the goods againſt any carrier, who after notice to retain the goods delivers them to the perſon to whom they were originally conſigned: ſuch a rule would be highly oppreſſive to carriers. A carrier knows nothing of the vendor. In the caſe of a conveyance by ſhip, the maſter ſigns a bill of lading by which he engages to deliver the goods to the conſignee or his order: and if he deliver them accordingly it can hardly be ſuppoſed that he thereby ſubjects himſelf to an action, becauſe the vendor has a right to ſtop the goods *in tranſitu* (*a*). In the preſent caſe, however, full notice was given to the wharfinger by the conſignor, and no demand was made on the part of the original conſignee. The conſignor by letter demanded poſſeſſion; and the wharfinger admitted himſelf to be in the nature of a ſtakeholder bound to deliver according to the right. Without determining therefore whether the wharfinger would have been liable without notice, or even after notice, ſuppoſing no undertaking to have been made by him, I think it clear that the Defendant in this caſe having undertaken "not to deliver the goods out of his cuſtody till he was certain of a ſafe delivery," is anſwerable to the Plaintiff.

Heath J. I am of the ſame opinion. The general rule of law is admitted on all hands. The only point in this caſe depends upon the application of that rule to the facts. The queſtion therefore is, whether theſe goods in point of fact were ſtopped *in tranſitu?* Here there certainly was no corporal touch: but that took place which was equivalent to it. The Plaintiffs gave notice to the wharfinger and demanded the goods as their property: and the wharfinger undertook not to deliver them till he was certain of a ſafe delivery. It is unneceſſary therefore to conſider whether without ſuch undertaking the Defendant would have been liable. Whenever that caſe occurs it will receive due conſideration from the Court. In this caſe doubts have ariſen with ſome of the Court reſpecting the effect of the letter of the 16th of *September*. It appears to me however that it will not vary the Plaintiffs' right.

(*a*) In *Fearon* v. *Bowers*, 1 *H. Bl.* 364. *in notis*, it was held by *Lee* Ch. J. that where ſeveral bills of lading are indorſed to different perſons, the captain is diſcharged by a delivery to either of the conſignees.

In *Berwick* v. *Atkyn*, 1 *Str.* 165. the refuſal by the bankrupt to receive the property ſeems to have been conſidered meritorious. So I think that the conduct of the bankrupts in this caſe was commendable.

Rooke J. In this caſe there is no diſpute reſpecting the rule of law. The only difficulty ariſes upon the application of the facts to the law. It is agreed that a contract once completely executed cannot be reſcinded. If therefore the goods had got into the hands of the conſignee, there is no doubt that he would have been precluded from giving a preference to any one. But while the goods are *in tranſitu* they may be ſtopped. Then can there be any doubt whether theſe goods were *in tranſitu* or not? The conſignees did nothing to take poſſeſſion of the goods while they remained with the wharfinger before the Plaintiffs made their claim. That claim was made in conſequence of information (which appears to me to have been very proper) that circumſtances had ariſen in the affairs of the conſignees which made it improper for them to receive the goods. In what manner that information was obtained can make no difference in the caſe. The honeſty of the conſignees ought not to prejudice the Plaintiffs' right. If indeed the conſignees after getting the goods into their hands had given them up, the caſe would have been very different: but here the information was given while the goods were *in tranſitu*. I do not meddle with the queſtion how far an action might be maintained againſt a carrier upon a bare notice not to deliver; but I do not ſay that ſuch an action might not be maintained.

Chambre J. The 1ſt queſtion is, whether theſe goods were *in tranſitu* at the time they were claimed by the Plaintiffs? The goods were directed to be ſent to *North Tawton* where the bankrupt lived, and having been carried as far as they could go by water they were delivered to a wharfinger to be forwarded to the bankrupt. While they were with the wharfinger the demand was made, no act having been done to ſhorten the journey. We cannot, therefore, without overturning all the caſes, ſay the goods were not *in tranſitu*. The ſecond objection is, that in order to entitle the Plaintiffs to this action, they ſhould have been taken actual poſſeſſion of by the Plaintiffs, either by corporal touch, or ſomething equivalent thereto. The firſt delivery to the carrier veſts the property in the vendee, but the property ſo veſted is a defeaſible property, and may be defeated by the inſolvency of the vendee.

1801.

Mills and Others v. Ball.

When therefore the vendor, having notice of ſuch inſolvency, makes a demand upon the perſon in whoſe cuſtody the goods are, he thereby defeats the contract. If this were not the caſe, the carrier would have it in his power to decide between the vendor and the aſſignees of the bankrupt. In the preſent caſe there can be no doubt of a converſion having taken place. Caſes of difficulty may indeed ariſe; as if a carrier upon reaſonable doubt ſhould refuſe to deliver up the goods without further authority, or until the circumſtances of the caſe are aſcertained (*a*): for a demand and refuſal do not always conſtitute a converſion (*b*); there are many caſes to the contrary. But here there was an actual converſion, the defendant having delivered the goods contrary to his own undertaking. There is another point however upon which I have entertained ſome doubt. The vendor did not get poſſeſſion of theſe goods by his own diligence and care, or in conſequence of caſual information; but through the intervention of the bankrupt himſelf eight days after the act of bankruptcy committed. That circumſtance raiſed ſome doubt in my mind; ſince it appeared that the bankrupt had thereby given a preference to the Plaintiffs over the reſt of his creditors. But ſtill upon the whole I am inclined to agree with the reſt of the Court. I am not fond of multiplying ſmall diſtinctions, and think that too many have been already taken: and the general inconvenience will not be very great, ſince many caſes of this kind are not likely to ariſe. It ſeems indeed that there will be a certain degree of diſcretion veſted in the bankrupt, ſince he will be empowered to accept goods which are coming to him from one conſignee, and to give notice to another conſignee to ſtop them *in tranſitu*. But as no fraud appears to have been committed on the part of the Plaintiffs in this caſe, I am inclined on this point, as well as the others, though not without ſome doubt, to concur with the reſt of the Court.

Per Curiam, Let the verdict be entered for the Plaintiffs for 99*l.* 17*s.*

(*a*) If a perſon finds my goods and I demand them, and he anſwers that he knows not whether I am the true owner or not, and therefore refuſes to deliver them, this is not to be deemed a converſion to his own uſe, as he keeps them for the owner. *Dict. Per Coke* Ch. J. 2 *Bulſtr.* 312. The ſame doctrine is laid down by Lord *Kenyon*, in *Solomon* v. *Dawes*, 1 *Eſp. N. P. Caſ.* 83.

(*b*) *Dict. Per* Lord *Mansfield*, 3 *Burr.* 1243. And indeed if demand and refuſal only be found upon a ſpecial verdict, it ſhall not be adjudged a converſion, 10 *Co.* 57. *Hob.* 187. 2 *Mod.* 245. See alſo *Roſs* v. *Johnſon*, 5 *Burr.* 2827, and *Syeds* v. *Hay*, 4 *Term Rep.* 260.

1801.

Govett *v.* Johnson and Another.

June 17th.

When two only of three joint contractors are ſued, the Court will not ſtay proceedings upon the bail bond unleſs the Defendants will undertake not to plead in abatement.

Lens and *Bayley* Serjts. were to have ſhewn cauſe againſt ſtaying proceedings upon the bail-bond in this caſe on the uſual terms, but ſaid they ſhould content themſelves with inſiſting againſt the Defendants being allowed to plead in abatement that two only out of three joint-contractors were ſued; and to ſhew that they ought to be reſtrained from ſo pleading, they cited 2 *Salk.* 519. *Anon.* as directly in point.

Beſt and *Onſlow* Serjts. contended, that the plea that other joint-contractors were not ſued was not a mere dilatory plea, and therefore the Court would not impoſe ſuch a reſtriction as the Plaintiff required.

But *the Court* ſaid they thought it a very reaſonable reſtriction, and that they would not ſtay the proceedings on the bail-bond to give the Defendants an opportunity of pleading in abatement.

Rule abſolute, on the Defendants undertaking not to plead in abatement.

Lees *v.* Warlters.

June 18th.

The Defendant in replevin having averred in his cognizance that the Plaintiff held the land under "a certain demiſe to him the ſaid *J. L.* (the Plaintiff) theretofore made," Plaintiff pleaded in bar that he did not hold under a demiſe in manner and form. Upon this Defendant obtained an order to amend by ſtriking out the words " to him the ſaid *J. L.*" with liberty to the Plaintiff to plead *de novo*, and that in caſe the Plaintiff ſhould plead new matter, the Defendant ſhould pay all the coſts of the amendment. The Defendant having amended accordingly, the Plaintiff demurred ſpecially, and aſſigned for cauſe that it did not appear to whom the demiſe was made. Held that the demurrer was not new matter.

Replevin. The Defendant made cognizance as bailiff to *J. L.* for rent arrear, and in his ſeveral cognizances ſtated that the Plaintiff held the land " under a certain demiſe to him the ſaid *John Lees* theretofore made." The Plaintiff pleaded in bar, that he did not hold the land under a demiſe to him made in manner and form, &c. After this the Defendant obtained a judge's order ' that he ſhould be at liberty to amend the cognizances, by ſtriking out in each cognizance the words " to him the ſaid *John Lees*," and that the Plaintiff ſhould alſo be at liberty to plead *de novo*; and in caſe the Plaintiff ſhould plead new matter, the Defendant ſhould pay the coſts of the amendment to be taxed by the Prothonotary; but if the Plaintiff ſhould not plead new matter, the Defendant ſhould pay ſuch coſts only as ſhould be occaſioned by making the cauſe a *remanet*, and paſſing the record.' The cognizances having been amended according to the order, the Plain-

1801.

LEES
v.
WALTERS.

tiff demurred, ſpecially aſſigning for cauſe that it did not appear to whom the demiſe was made (*a*).

The Prothonotary conſidering the ſpecial demurrer as new matter, allowed all the coſts of the amendment; upon which a rule was obtained by *Bayley* Serjt. calling on the Plaintiff to ſhew cauſe why the Prothonotary ſhould not be directed to review his taxation.

Againſt which rule *Beſt* Serjt. now ſhewed cauſe, and contended, that the demurrer aroſe entirely out of the alteration in the cognizances, and ſtated that it had always been the practice in the Prothonotary's office to conſider ſuch a demurrer as new matter; in which he was confirmed by the Prothonotary himſelf.

But *the Court* were of opinion that this ſpecial demurrer ought not to be conſidered as new matter within the meaning of the order, and directed the Prothonotary to review his taxation.

Rule abſolute.

(*a*) *Vid.* the Stat. 11 *Geo.* 2. *c.* 19. *ſ.* 2. which empowers Defendants in replevin to avow or make conveyance generally without ſetting out the title of the leſſor.

June 18th.

HOWELL *v.* COLEMAN.

The Court will not ſet aſide proceedings and order the bail bond to be delivered up, becauſe a Defendant has been arreſted on a ſpecial *capias* in which as well as in the affidavit to hold to bail, the initials only of his Chriſtian name were inſerted.

BAYLEY Serjt. moved for a rule to ſhew cauſe why all proceedings in this caſe ſhould not be ſet aſide for irregularity, and the bail-bond be delivered up to be cancelled.

It appeared that the Defendant had been arreſted upon a ſpecial *capias*, in which he was named *W. G. Coleman*, without ſtating either of the Chriſtian names at length, and that the affidavit to hold to bail deſcribed him in the ſame manner.

The Court obſerved, that the Defendant had not been arreſted by a wrong name, and thought the objection immaterial.

Bayley took nothing by his motion.

TAPPENDEN and Others, Aſſignees of BRAY *v.* RANDALL.

June 19th.

A. in conſideration of 200*l.* paid by *B.* gave a bond for the payment of an annuity to the latter of 100 guineas, until the hop duties ſhould amount to a certain ſum. Before this event had taken place *A.* brought an action to recover back the 200*l.* of *B.* Held that the action was maintainable.

THIS cauſe came on to be tried before Lord *Alvanley* Ch. J. at the ſecond Sittings in this Term, when a verdict was found for the Plaintiffs, damages 216*l.* coſts 10*l.* ſubject to the opinion of the Court on the following caſe.

The declaration ſtated, that the Defendant, before the bankruptcy of *Bray*, was indebted to *Bray* in 300*l.* for money lent, and 300*l.* for money paid, and that he was indebted to the Plaintiffs after the bankruptcy in 300*l.* as well for money before *Bray* became a bankrupt received to *Bray*'s uſe, as for money after the bankruptcy received to the uſe of the aſſignees, and upon an account ſtated with the Plaintiffs as aſſignees.

Bray duly became a bankrupt, and a commiſſion was iſſued againſt him, under which the Plaintiffs were declared his aſſignees. On the 12th of *November* 1800, previous to any act of bankruptcy, in conſideration of 210*l.* then paid by *Bray* to the Defendant, the Defendant entered into a bond in the penal ſum of 999*l.* with a condition as follows: "Whereas the ſaid *William Randall* hath, in "conſideration of two hundred and ten pounds to him paid by "the ſaid *John Bray*, at the time of the ſealing and delivery of "the above written bond or obligation, contracted and agreed to "pay unto the ſaid *John Bray* or his aſſigns on the firſt day of "*May* in every year, one annuity or clear yearly ſum of one hundred and five pounds until he the ſaid *William Randall*, his "heirs, executors, or adminiſtrators can prove by evidence, or "otherwiſe to abide by the report of three eminent hop merchants, who ſhall make it appear to the ſatisfaction of the ſaid "*John Bray*, his executors, adminiſtrators, and aſſigns, that the "revenue received by Government by reaſon of the duties now "aſſeſſed by Parliament upon hops grown in *Great Britain*, "ſhall in the preſent or any one year hereafter amount to a full "and clear revenue or ſum of two hundred thouſand pounds, "ſuch duties to be taken according to thoſe at preſent impoſed by "Parliament, and not to be affected by any ſubſequent alteration "whatever; and for ſecuring the due payment of the ſaid annuity "of one hundred and five pounds until ſuch event, the ſaid *William*

“ *liam Randall* hath entered into the above written bond or obli-
“ gation: Now therefore the condition of the above written
“ bond or obligation is ſuch that if the ſaid *William Randall*, his
“ heirs, executors, adminiſtrators, or aſſigns, ſhall and do from the
“ day of the date of the above bond well and truly pay, or cauſe
“ to be paid unto the ſaid *John Bray* or his aſſigns one annuity
“ or clear yearly ſum of one hundred and five pounds of lawful
“ money of *Great Britain* on the firſt day of *May* in each and
“ every year, without any deduction or abatement whatſoever,
“ until the ſaid *William Randall*, his heirs, executors, or adminiſ-
“ trators ſhall prove by evidence, or otherwiſe abide by the report
“ of three eminent hop merchants, who ſhall make it appear to
“ the ſatisfaction of the ſaid *John Bray* or his aſſigns that the re-
“ venue received by Government by reaſon of the duties now
“ aſſeſſed by Parliament upon hops ſhall in the preſent or any one
“ year hereafter amount to a full and clear revenue or ſum of two
“ hundred thouſand pounds, ſuch duties to be taken according to
“ thoſe at the preſent time impoſed by Parliament, and not to be
“ affected by any ſubſequent alteration therein, and ſhall and do
“ make the firſt payment of the ſaid annuity of one hundred and
“ five pounds on the firſt day of *May* in the year of our Lord
“ 1802, then and in ſuch caſe or caſes the above written bond or
“ obligation ſhould be void and of none effect, otherwiſe it ſhall
“ be and remain in full force and virtue.

“ *Wm. Randall* (Seal).

“ Sealed and delivered (being firſt legally
“ ſtamped, and ſeveral obliterations and
“ interlineations being made) in preſence
“ of

“ *John Broad.*
“ *Wm. Mann.*

“ Received at the time of the ſealing and delivery of the within written bond or obligation of and from the within named *John Bray* the ſum of two hundred and ten pounds (being the conſideration paid for the annuity within ſecured), by me. Signed in the preſence of *John Broad*, *Wm. Mann.* } £.210.

Wm. Randall.”

Before the bringing of this action the Plaintiffs applied to the Defendant, ſtating that they conſidered the bond to be illegal, and demanding the return of the 210*l.* and intereſt, which was refuſed.

If the Court ſhould be of opinion that the Plaintiffs were entitled to recover back the ſaid ſum of 210*l.* with intereſt thereon, then the verdict to ſtand. If the Court ſhould be of opinion that the Plaintiffs were entitled to recover back the ſaid ſum of 210*l.* but were not entitled to intereſt thereon, then the verdict to be entered for 210*l.* damages and 40*s.* coſts. If the Court ſhould be of opinion that the Plaintiffs were entitled to recover nothing, a nonſuit to be entered.

Bayley Serjt. for the Plaintiffs. The Plaintiffs' right to recover in this action reſults from two points, which are both clearly in their favour, viz. 1ſt, That the bond ſtated in the caſe, and upon which the money was advanced is void; and, 2dly, that this action is brought before the event has happened, which the parties had in contemplation at the time of entering into the contract. 1ſt, That the bond is void, moſt clearly appears from *Atherfold* v. *Beard*, 2 *Term Rep.* 610. and *Shirley* v. *Sankey*, *ante*, 130. [This was admitted on the other ſide.] 2dly, The money advanced by the bankrupt was not advanced on a contract which was either *malum prohibitum* or *malum in ſe*, but merely money advanced on a conſideration which has failed, the bond given to ſecure its repayment not being ſuch as can be enforced at law. In *Cotton* v. *Thurland*, 5 *Term Rep.* 405. which was an action to recover a depoſit from a ſtake-holder on a wager reſpecting the event of a boxing match, it was admitted that as long as the contract is executory, money ſo paid may be recovered back; and though that caſe was decided on the ground of the action being brought againſt the ſtakeholder, who not having paid it over was juſtified in refuſing to return it, yet Lord *Kenyon* alludes to the diſtinction between contracts executory and executed when he ſays, "this is not like the caſe of a policy of inſurance, where the riſk having been run the party has attempted to regain his money again." Indeed, in *Lowry* v. *Bourdieu*, *Doug.* 468. where the inſured in an illegal policy attempted to recover back the premium after the riſk had been run, *Buller* J. ſays, "there is a ſound diſtinction between contracts executed and executory, and if an action is brought to reſcind a contract you muſt do it while the contract continues executory;" and obſerves that if the action had been commenced before the riſk was over the Plaintiff might have had a ground for his demand. With reſpect to the late caſe of *Vandyck* v. *Hewitt*, 1 *Eaſt*. 96. where it was held that the premium paid on an inſurance to cover enemy's property could not be recovered back, there the riſk had been run before the action was brought, and the act of inſuring enemy's property was an offence againſt the policy of the ſtate. Indeed in *Lacauſſade* v. *White*, 7 *Term Rep*. 535. money paid on an illegal wager was recovered back after the event upon which the wager proceeded had turned out againſt the Plaintiff, the Court holding it more conſonant to ſound policy to permit money paid on an illegal conſideration to be recovered back by the party paying it, than by denying the remedy to give effect to the illegal contract.

Beſt Serjt. for the Defendant. It is perfectly clear that where money has been advanced without any conſideration it may be recovered back, but if advanced on a conſideration which fails becauſe the contract is illegal, then the rule applies that *in pari delicto potior eſt conditio poſſidentis*. The only caſe in which this rule has ever been impeached at all is *Lacauſſade* v. *White*, and that deciſion was treated by the Court in *Vandyck* v. *Hewitt* as not quite ſound, *Le Blanc* J. ſaying it had ſince been "very much canvaſſed in *Howſon* v. *Hancock* (*a*), where it was conſidered that money depoſited on an illegal wager and paid over to the winner could not be recovered from him." If the contract in the preſent caſe be a legal one, the bond is not void but the Plaintiff will have the benefit of the conſideration he has advanced when his time comes to demand payment of the annuity; if it be not legal the rule of *potior eſt conditio poſſidentis* applies. It is not neceſſary that the contract ſhould be immoral, it is ſufficient if it be illegal; and indeed in *Howſon* v. *Hancock*, Lord *Kenyon* ſo treats it when he ſays, "here the money was not paid on an immoral, though an illegal conſideration," (viz. a wager on a horſe-race) and yet the Plaintiff was not permitted to recover.

Lord Alvanley Ch. J. Without taking time to look into all the caſes which have been cited, it does appear to me to be clear that the Plaintiff in this caſe is entitled to recover back the money which he has advanced. In the preſent tranſaction there was no moral turpitude whatſoever: and though it has ſometimes been held that where there is moral turpitude in the contract, the Court

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(*a*) 8 *Term Rep*. 575.

will not allow the party who has advanced money on ſuch a contract to recover it back; yet no argument of that ſort can be urged in the preſent caſe. The ſimple ſtatement of this caſe is, that after the money had been paid, but before the time had arrived at which the event in contemplation of the parties contracting was to take place, it was found out that the contract was illegal; and therefore the money paid was demanded back again. There is hardly any caſe of this ſort in which the diſtinction between immoral and illegal tranſactions has not been taken. I do think that there is a material diſtinction between wagers which are not recoverable on account of ſome inconvenience which the public may ſuſtain by the open diſcuſſion of the queſtions to which they give riſe, and thoſe which are in themſelves immoral. In the preſent caſe one party has paid money without any conſideration and is therefore entitled to recover it back from the party to whom he paid it.

Heath J. I am of the ſame opinion. It ſeems to me that the diſtinction adopted by Mr. Juſtice *Buller* between contracts executory and executed, if taken with thoſe modifications which he would neceſſarily have applied to it, is a ſound diſtinction. Undoubtedly there may be caſes where the contract may be of a nature too groſsly immoral for the Court to enter into any diſcuſſion of it; as where one man has paid money by way of hire to another to murder a third perſon. But where nothing of that kind occurs I think there ought to be a *locus pœnitentiæ*, and that a party ſhould not be compelled againſt his will to adhere to the contract.

Rook J. This is an action brought by aſſignees to recover back money paid by way of conſideration for a bond which clearly could not be put in force, and I think this action may well be ſupported. There is nothing criminal in the contract which was entered into between theſe parties; nor has that contract been executed; nor indeed is this a caſe where money which has been paid over by a ſtakeholder is ſought to be recovered. I therefore ſee no reaſon to prevent the preſent Plaintiffs from recovering: and I wiſh it to be underſtood that I fully accede to the doctrine laid down by Mr. Juſtice *Buller* reſpecting contracts executory and executed. If in this caſe any money had been paid upon the bond I ſhould have felt great difficulty reſpecting the right of the Plaintiffs to recover.

CHAMBRE J. Undoubtedly there is a great deal of refinement in the diſcuſſion which ariſes out of this ſpecies of action: but ſtill I think that the nature of this contract is not ſuch as to prevent the Plaintiff from recovering the money which he has advanced without conſideration. The contract which the parties entered into is not prohibited by any declaration of any poſitive law upon the ſubject, nor is it *malum in ſe:* but it is a contract which cannot be put in force merely becauſe it is inconvenient that the merits of the queſtion ſhould be publicly diſcuſſed. Indeed, ſuppoſing the parties able to refer to ſome publiſhed documents reſpecting the amount of the duties, all objections to the wager would ceaſe. Before the contract was in any way executed, it being found that the aid of the law could not be had to enforce the bond, application was made to the Defendant to pay back the money which had been advanced, and the Defendants having refuſed to pay it, I think the Plaintiffs are entitled to recover in this action.

Poſtea to the Plaintiffs.

It was then ſuggeſted to the Court that it would be neceſſary for them to give an opinion reſpecting the amount which the Plaintiffs were entitled to recover; upon which the Court obſerved that in an action for money had and received, nothing but the net ſum advanced without intereſt could be recovered (*a*), and that the verdict muſt therefore be entered for the leſſer ſum.

(*a*) Vide *Moſes* v. *Macferlan*, 2 *Burr.* 1005. and *Walker* v. *Conſtable*, *ante*, vol. i. p. 306.

June 20th.

BAGOTT *v.* ORR.

Primâ facie, every ſubject has a right to take fiſh found upon the ſea ſhore between high and low water mark; but ſuch general right may be abridged by the exiſtence of an excluſive right in ſome individual. *Quære*, If there be a *primâ facie* right in the ſubject to take *fiſh-ſhells* found on the ſea ſhore between high and low water mark.

TRESPASS. The 1ſt count was for breaking and entering the Plaintiff's cloſes, called the *Foot-Muſcle-Skear*, the *Great-Out-Muſcle-Skear*, and the *Sea-Shore*, in the pariſh of *Keyſham*, and Plaintiff's ſhell-fiſh and ſhells there finding, catching, taking, and carrying away and converting and diſpoſing thereof to Defendant's own uſe. The 2d count was for breaking and entering the ſame cloſes, and with Defendant's feet and the feet of his ſervants in walking, treading up, trampling upon, ſubverting and ſpoiling Plaintiff's ſoil, earth, and ſand, and with the feet of cattle and with the wheels of carriages and the keels of boats treading up, trampling, &c. and Plaintiff's ſhell-fiſh and ſhells, breaking, cruſhing, and deſtroying, and with ſpades, ſhovels, mattocks, pickaxes and other inſtruments digging and making holes and pits, and turning up, &c. Plaintiff's earth, ſoil, and ſand, and digging up, raiſing up, and getting up divers large quantities of Plaintiff's ſhell-fiſh and ſhells, and carrying away the ſame and converting and diſpoſing thereof to Defendant's own uſe. There were ſeveral other counts for breaking and entering Plaintiff's ſeveral fiſhery and his free fiſhery, on which iſſues in fact were joined.

The Defendant pleaded, 1ſt, the general iſſue. 2dly, As to the treſpaſſes mentioned in the two firſt counts that the cloſes therein ſeverally mentioned were the ſame, " and that the ſaid cloſes in which, &c. at the ſaid ſeveral times when, &c. were and ſtill are and from time immemorial have been part and parcel of a certain arm of the ſea, in which every ſubject of this realm at the ſaid ſeveral times when, &c. of right had, and of right ought to have had and now hath, and of right ought to have the liberty and privilege of fiſhing and catching, digging for, raiſing, getting, taking and carrying away ſhell-fiſh and ſhells there, therefore Defendant being a ſubject of this realm at the ſaid ſeveral times when, &c. entered into the ſaid cloſes in which, &c. ſo being part and parcel of the ſaid arm of the ſea to fiſh therein and to catch, dig for, raiſe, get, take, and carry away the ſhell-fiſh and ſhells there, and did then and there fiſh and caught, took, and carried away the ſaid ſhell-fiſh and ſhells in the firſt count mentioned, and alſo dug up, raiſed up, and got up, took and carried away the ſaid other ſhell-fiſh and ſhells in the ſecond count laſtly mentioned, as it was lawful for him to do, and for the digging up and carrying away of the ſaid ſhell-fiſh, he entered the ſaid cloſes in which, &c. by himſelf and with other perſons, and with the ſaid cattle, carts, waggons, and other carriages, and the ſaid boats, lighters, and other veſſels, the ſame being reaſonable, proper, and neceſſary in that behalf, and in ſo doing he neceſſarily and unavoidably with his feet and the feet of thoſe other perſons in walking a little trod up, trampled upon, ſubverted and ſpoiled the ſoil, earth, and ſand in the ſecond count mentioned, and with the feet of the ſaid cattle and with the wheels of the ſaid carts, waggons, and other carriages, and with the keels of the ſaid boats, lighters, and other veſſels a little trod up, trampled upon, tore up, and ſubverted and ſpoiled other the

1801.

BAGOTT *v.* ORR.

ſoil of Plaintiff's laſt mentioned cloſes, and the ſaid ſhell-fiſh and ſhells in the ſecond count firſt mentioned neceſſarily and unavoidably a little broke, cruſhed, and deſtroyed, and with the ſaid ſpades, ſhovels, mattocks, pickaxes, and other inſtruments, the ſame being uſeful, proper, and neceſſary in that behalf, and in digging up, raiſing, and getting the ſaid ſhell-fiſh and ſhells in the ſecond count laſtly mentioned, neceſſarily and unavoidably dug and made the ſaid holes and pits in Plaintiff's ſaid cloſes, and neceſſarily and unavoidably with the ſpades, ſhovels, mattocks, pickaxes, and other inſtruments dug up, turned up, ſubverted, and ſpoiled a little of the earth, ſoil, and ſand in the ſaid cloſes, doing as little damage on that occaſion as he could, which are the ſame, *&c.* whereof, *&c.* And this, *&c.* wherefore, *&c.*

Upon this the Plaintiff new aſſigned, alleging that Defendant on the days in the firſt count mentioned broke and entered Plaintiff's cloſes in the firſt count mentioned, " being certain cloſes lying within the flux and reflux of the tides of the ſea in Plaintiff's manor of *Keyſham*, and the ſaid ſhell-fiſh and ſhells there then found, caught, took, and carried away and converted and diſpoſed thereof to his own uſe, when the ſame cloſes in which, *&c.* were left dry and were not covered with water." And alſo that Defendant on the days and in the manner in the ſecond count mentioned broke and entered Plaintiff's cloſes, " being certain cloſes lying within the flux and reflux of the tides of the ſea within Plaintiff's ſaid manor of *Keyſham*, and with his feet, *&c.* trod up, *&c.* the ſaid earth, ſoil, and ſand, in the ſecond count mentioned, and with the feet of the ſaid cattle in that count mentioned, and with the wheels of the ſaid carts, *&c.* and with the keels of the ſaid boats, *&c.* trod up the ſaid other ſoil in Plaintiff's laſt mentioned cloſes in the ſaid ſecond count mentioned, and Plaintiff's ſaid other ſhell-fiſh and ſhells in the ſecond count mentioned, broke, cruſhed, *&c.* and with ſpades, *&c.* dug and made holes, *&c.* and raiſed up and got up the ſaid ſhell-fiſh and ſhells, *&c.* and took and carried away the ſame, and converted and diſpoſed thereof, *&c.* when the laſt mentioned cloſes in which, *&c.* were left dry and were not covered with water, as Plaintiff hath in the firſt and ſecond counts of the ſaid declaration complained againſt him, which ſeveral treſpaſſes ſo above new aſſigned are other and different treſpaſſes, *&c.* Wherefore, *&c.*

To the new aſſignment the Defendant pleaded, 1ſt, the general iſſue; 2dly, "that the ſaid cloſes firſt above newly aſſigned, and the ſeveral cloſes ſecondly above newly aſſigned are, and at the ſaid ſeveral times, *&c.* were the ſame cloſes and not other or different cloſes, and are and at thoſe times when, *&c.* were certain rocks and ſands of the ſea, lying within the flux and reflux of the tides of the ſea; and that the ſaid ſhell-fiſh and ſhells in the ſaid cloſes in which, *&c.* were certain ſhell-fiſh and fiſh-ſhells, which at the ſaid ſeveral times when, *&c.* were in and upon the ſaid rocks and ſands of the ſea, and which but a little before the ſaid times when, *&c.* were by the ebbing of the tides of the ſea left there in and upon the ſaid cloſes in which, *&c.*; and that in the ſaid cloſes in the ſaid declaration mentioned every ſubject of this realm at the ſaid ſeveral times when, *&c.* of right had and of right ought to have had, and now hath and of right ought to have the liberty and privilege of getting, taking, and carrying away the ſhell-fiſh and fiſh-ſhells left by the ſaid ebbing of the tides of the ſea in and upon the ſaid cloſes, in which, *&c.* wherefore the Defendant being a ſubject of this realm at the ſaid ſeveral times when, *&c.* entered into the ſaid cloſes in which, *&c.* to get take and carry away the ſhell-fiſh and fiſh-ſhells left by the ebbing of the tides of the ſea in and upon the ſaid cloſes in which, *&c.* and then and there got, took, and carried away the ſaid ſhell-fiſh and ſhells in the ſaid firſt count mentioned, and alſo got, and for that purpoſe with ſpades, ſhovels, mattocks, pickaxes, and other inſtruments neceſſarily dug up and raiſed up, and took and carried away the other ſhell-fiſh and ſhells in the ſecond count laſtly mentioned; and for the getting, taking, and carrying away of the ſaid ſhell-fiſh and ſhells, the Defendant at the ſaid times when, *&c.* entered the ſaid cloſes in which, *&c.* as it was lawful for him to do by himſelf and with other perſons, and with the ſaid cattle, carts, waggons, and other carriages, and the ſaid boats, lighters, and other veſſels, the ſame being reaſonable and proper and neceſſary in that behalf, and in ſo doing he neceſſarily and unavoidably with his feet and the feet of thoſe other perſons in walking, a little trod up, trampled, ſubverted, and ſpoiled the ſoil, earth, and ſand in the ſaid ſecond count mentioned, and with the feet of the cattle and with the wheels of the ſaid carts, waggons, and other carriages, and with the keels of the ſaid boats, lighters, and other veſſels a little trod up, trampled upon, tore up, ſubverted, and ſpoiled other the ſaid ſoil of the ſaid laſt-mentioned cloſes of the Plaintiff, and the ſhell-fiſh and ſhells in the ſecond count firſt mentioned, neceſſarily and unavoidably a little broke, cruſhed, and deſtroyed, and with the ſaid ſpades, ſhovels, mattocks, pickaxes, and other inſtruments, the ſame being uſeful, proper, and neceſſary in that behalf, in digging up, raiſing, and getting the ſaid ſhell-fiſh and ſhells in the ſaid ſecond count laſtly mentioned, neceſſarily and unavoidably dug and made the ſaid holes and pits in Plaintiff's ſaid cloſes, and neceſſarily and unavoidably with the ſaid ſpades, ſhovels, mattocks, pickaxes, and other inſtruments dug up, turned up, ſubverted, and ſpoiled a little of the ſaid earth, ſoil, and ſand in the ſaid cloſes, as it was lawful for him to do for the cauſes aforeſaid, doing as little damage on that occaſion as he could, which are the ſame, *&c.* whereof, *&c.* And this, *&c.* wherefore, *&c.*"

To this plea there was a replication, traverſing the right of every ſubject to take ſhell-fiſh and ſhells, and a ſpecial demurrer thereto becauſe it traverſed matter of law: but the Court ſeeming to think that the replication was clearly bad, it was abandoned by the Plaintiff's Counſel, who relied upon objections to the plea.

Marſhall Serjt. in ſupport of the plea. The queſtion is, whether every ſubject of the realm has a right to take the ſhell-fiſh and ſhells which are left upon the ſea-ſhore by the ebbing of the tides. The right of fiſhing in the ſea is acknowledged by all nations; it is univerſal, and part of the law of nations. *Grotius de Jure Bel. ac Pac. lib.* 2. *c.* 2. *ſ.* 3. And according to *Grotius* no perſon can have any property either in the main ſea, or in the principal arms of the ſea; neither can a man have any property in the ſhores and ſands of the ſea: theſe are all incapable of improvement, and never can be exhauſted by the only uſes to which they can be applied, namely thoſe of ſupplying fiſh and ſand. *Bracton* (*lib.* 1. *c.* 12. *fo.* 7. *b.*) adopting the doctrine of the civil laws, ſays, "*Naturali vero jure communia ſunt omnia hæc, aqua profluens, aer, et mare, et littora maris, quaſi maris acceſſoria; nemo enim ad littus maris accedere prohibetur dum tamen a villis et ædificiis abſtineat: quia littora ſunt de jure gentium communia ſicut et mare.*" And he adds, "*Publica vero ſunt omnia flumina et portus; ideoque jus piſcandi omnibus commune eſt in portu et in fluminibus; riparum etiam uſus publicus eſt de jure gentium ſicut ipſius fluminis.*" So Sir *Mathew Hale* in his *Treatiſe de Jure Maris, part* 1. *cap.* 4. *Hargrave's Law Tracts, p.* 10, 11. obſerves, "In the ſea the King of *England* hath a double right, namely a right of juriſdiction, which he ordinarily exerciſeth by his admiral, and a right of propriety or ownerſhip. The King's right of propriety or ownerſhip in the ſea is evidenced principally in theſe things that follow: 1ſt, The right of fiſhing in this ſea and the creeks and arms thereof is originally lodged in the Crown, as the right of depaſturing is originally lodged in the owner of the waſte whereof he is lord, or as the right of fiſhing belongs to him that is the owner of a private or inland river. But though the king is the owner of this great waſte, and as a conſequent of his property hath the primary right of fiſhing in the ſea, and the creeks and arms thereof, yet the common people of *England* have regularly a liberty of fiſhing in the ſea, or creeks or arms thereof as a public common of piſcary; and may not without injury to their right be reſtrained of it unleſs in ſuch places, creeks, or navigable rivers where either the king or ſome particular ſubject hath gained a propriety excluſive of that common liberty." In the ſame treatiſe, p. 12. it is ſaid, " that *de jure communi* between the high water and low water mark, doth *primâ facie* belong to the king; *Conſtable*'s caſe, 5 *Co.* 107. and *Dyer*, 326. *b.*; although it is true that ſuch ſhore may be and commonly is parcel of the manor adjacent; and ſo may belong to a ſubject, yet *primâ facie* it is the king's." From *Conſtable*'s caſe, 5 *Co.* 107. 2 *Rol. Abr.* 170. it appears that the ſhore may belong to the ſubject either in groſs or as parcel of his manor: but merely being the manor of a particular perſon is not ſufficient to exclude thoſe who have a right to fiſh there. One may have a manor and another the right of fiſhing in the water; but if a man would claim a right of fiſhing in the water of another, the proof of the right lies upon him. In *Warren* v. *Mathews*, 6 *Mod.* 73. 1 *Salk.* 357. *S. C. Holt* Ch. J. ſays, " Every ſubject of common right may fiſh with lawful nets in a navigable river as well as in the ſea; and the king's grant cannot bar him thereof." So in 1 *Mod.* 105. Lord *Fitzwalter*'s caſe, *Hale* Ch. J. ſays, " In caſe of a river that flows and reflows, and is an arm of the ſea, there *primâ facie* it is common to all: and if any one will appropriate a privilege to himſelf the proof lieth on his ſide; for in caſe of an action of treſpaſs for fiſhing there, it is a good juſtification to ſay that the *locus in quo eſt brachium maris in quo unuſquiſque ſubjectus Domini Regis habet et habere debet liberam piſcariam.*' The ſoil of the river *Thames* is in the king, and the Lord Mayor is conſervator of the river, but it is common to all fiſhermen,

men; and therefore there is no contradiction in the ſoil being in one and the right of fiſhing in the river common to all fiſhermen." Again in *Ward* v. *Creſwell*, *Willes' Rep.* 265. 16 *Vin. Abr.* 354. tit. *Piſcary* B. *S. C.* the Court held that all the ſubjects of *England* of common right might fiſh in the ſea, it being for the good of the commonwealth, and for the ſuſtenance of all the people of the realm; and that therefore a preſcription for it as appurtenant to a particular townſhip was void, and as abſurd as a preſcription would be for travelling the king's high way, or for the uſe of the air as appurtenant to a particular eſtate. The Statute 7 *Jac.* 1. *c.* 18. after ſtating in the preamble that divers perſons having lands adjoining to the ſea coaſt in the counties of *Devon* and *Cornwall*, had of late interrupted the bargemen and ſuch others as had uſed at their free wills and pleaſures to fetch ſea ſand and take the ſame under the full ſea mark, as they had theretofore uſed to do, enacts that all perſons in the ſaid counties ſhould be at liberty to take ſea ſand at all places under the full ſea mark. That ſtatute was in fact a full recognition of the right of the ſubject to uſe the ſhore of the ſea in every way in which it could be ſerviceable to him. It proves that his right is not confined to the privilege of taking ſhell-fiſh left on the ſhore by the ebbing of the tibes, but that he may alſo take the fiſh-ſhells and even the ſand of the ſhore.

Beſt Serjt. *contrà*. Admitting the general right of the ſubject to take the fiſh of the ſea, ſtill in this caſe that general right is circumſcribed by the circumſtance of the place in which theſe ſhell-fiſh and fiſh-ſhells were taken being part of the manor of *Keyſham*. Unleſs therefore the Defendant ſet up a right of common on the ſoil, he cannot ſupport the eaſement which he claims. *Primâ facie* the ſhores of the ſea belong to the king, and he may grant any part of them to a ſubject either reſerving or not as he pleaſes a general right of fiſhery to all his ſubjects. The Plaintiff ought not to be called upon to preſcribe for a right of fiſhery over that which is admitted to be his own, for when once it is eſtabliſhed that the *locus in quo* belongs to the Plaintiff, it muſt be preſumed to be excluſively his, unleſs ſome inconſiſtent right is ſet up by the Defendant. The common law right of the ſubject to go upon the ſhores of the ſea between high and low water mark only applies to caſes where no excluſive right is veſted in any individual. Now it appears from the paſſage cited from *Hale*'s Treatiſe, *Hargrave*'s Tracts, p. 12. that an excluſive right to the ſhore may belong to a ſubject, though *primâ facie* it is in the king. Indeed in pages 26 and 27 of the ſame tract, Sir *Mathew Hale* ſpeaking of the ſea-ſhore ſays, "It may not only belong to a ſubject in groſs, which poſſibly may ſuppoſe a grant before time of memory, but it may be parcel of a manor," and proceeds to mention the ſeveral ways by which ſuch a right may be evidenced. To the ſame effect is *Com. Digeſt*, tit. *Navigation* A. and the caſe of the Abbot of *Ramſay*, *Dyer* 326. b.; and the ſame is admitted by Lord *Mansfield* in the caſe of *Carter* v. *Murcot*, 4 *Burr*. 2164. Although, however, the common law right of the ſubject ſhould be eſtabliſhed to take ſea-fiſh, yet it by no means follows that the ſubject has a right to take the ſhells which are thrown upon the ſea ſhore. It is well known that in many parts of *England* much of the various matter which is depoſited upon the ſhore by the ſea, belongs to the owners of the adjacent ſoil, and is diſpoſed of by them to very great advantage. The ſtatute 7 *Jac*. 1. which has been cited in ſupport of the right of the ſubject to take whatever is found between high and low water mark, ſeems to afford a contrary inference; for it is to be obſerved that it is an enacting and not a declaratory law, and that a peculiar privilege is thereby granted to the men of *Devon* and *Cornwall*, which peculiar privilege it would have been abſurd to grant if all the people of *England* had been entitled thereto by common law.

The Court were of opinion that if the Plaintiff had it in his power to abridge the common law right of the ſubject to take ſea-fiſh, he ſhould have replied that matter ſpecially, and that not having done ſo, the Plaintiff muſt ſucceed upon his plea as far as related to the taking of the fiſh; but obſerved that as no authority had been cited to ſupport his claim to take ſhells, they ſhould pauſe before they eſtabliſhed a general right of that kind. They therefore offered to allow the Defendant to amend his plea without coſts, by ſtriking out his claim to the fiſh-ſhells, and ſhaping his juſtification in ſuch way as he ſhould be adviſed. Which offer was accordingly accepted.

June 20th.

Abercrombie *v.* Parkhurst.

Replevin of cattle taken in *A.* The Defendant avowed the taking in *A.* under a demiſe of certain premiſes of which *B.* was parcel, and becauſe the cattle were damage feaſant in *B.* he took them and drove them through *A.* in his way to the pound; and upon general demurrer the avowry was held to be well pleaded.

Replevin of cattle taken in the pariſh of *Thames Ditton*, in the county of *Surry*, in a certain place there called *Claygate*.

The Defendant avowed the taking of the ſaid cattle in the ſaid declaration mentioned, in the ſaid place in which, *&c.*; and juſtly, *&c.* under a demiſe from the perſon ſeiſed in fee of certain premiſes "whereof a certain cloſe called *Helmens*, otherwiſe *Hellins*, was and from thence hitherto hath been, and ſtill is part and parcel;" into which he entered and took poſſeſſion: "and being ſo thereof poſſeſſed, becauſe the ſaid cattle in the ſaid declaration mentioned at the ſaid time when, *&c.* were in the ſaid cloſe called *Helmens*, otherwiſe *Hellins* parcel, *&c.* feeding and depaſturing upon the graſs and herbage of the Defendant there then growing, and otherwiſe doing damage there to the ſaid Defendant, he the ſaid Defendant well avows the taking of the ſaid cattle in the ſaid declaration mentioned, in the ſaid cloſe called *Helmens*, otherwiſe *Hellins* parcel, *&c.* as and for a diſtreſs for the ſaid damage ſo done and doing by the ſaid cattle there, and driving the ſaid cattle in the ſaid declaration mentioned from the ſaid cloſe called *Helmens*, otherwiſe *Hellins* parcel, *&c.* in and along the ſaid place in the ſaid declaration mentioned, in which, *&c.* in order to impound the ſame as he lawfully might for the cauſe aforeſaid; and juſtly, *&c.* and this, *&c.* wherefore, *&c.*" praying a return of the cattle.

To this there was a general demurrer and joinder.

Shepherd Serjt. in ſupport of the demurrer. The objection to the avowry is that the declaration having ſtated that the cattle were taken in a certain place called *Claygate*, the Defendant firſt avows that he did ſo take them, and then ſtates that he took them in a place called *Helmens*, otherwiſe *Hellins*, and drove them in and along the place in the declaration mentioned, in order to impound them. Now theſe latter facts he ſhould have firſt ſtated, and then have traverſed that he took the cattle at the place in the declaration mentioned; inſtead of which, according to the form of this avowry, he ſtates that which is inconſiſtent, namely, firſt that he took them at *Claygate*, and then that he took them elſewhere. In *Johnſon* v. *Wollyer*, 1 *Str.* 507. it is laid down by *Pratt* Chief Juſtice,

tice, that where the party avows at a different place in order to have a return he muſt traverſe the place in the count, becauſe his avowry is inconſiſtent with it. Indeed the form in which the Defendant ſhould have avowed appears in *Foot*'s caſe, 1. *Salk.* 93. where in replevin for taking a horſe *in quodam loco vocat'* the common marſh, the Defendant pleaded that he took it *in quodam loco vocat'* the plot, *abſque hoc*, that he took it *in quodam loco vocat'* the common marſh; and then *pro retorno habendo* went on to make conuſance for rent arrear: the Plaintiff having pleaded in bar to the conuſance, and traverſed the ſeiſin of the perſon under whom the rent was claimed, the Defendant demurred and had judgment, the Court ſaying that the Plaintiff had no right to traverſe the matter of the conuſance, and held it a diſcontinuance. Now in this caſe it is material to the Plaintiff to take an iſſue upon the cauſe of the taking, and yet in the way in which the avowry is pleaded he would be precluded from ſo doing: for if he had denied the ſeiſin, or the cattle being in *Helmens*, otherwiſe *Hellins*, it would according to the caſe in *Salkeld* have been a diſcontinuance.

Beſt Serjt. *contrà*, was ſtopped by the Court.

Lord ALVANLEY Ch. J. Upon principles of common ſenſe this ſeems to be an avowry very well pleaded. The Defendant has avowed that which was the truth of the caſe, namely, that though he had the cattle during part of the time in the cloſe called *Claygate*, yet that he originally took them in another cloſe called *Helmens*, otherwiſe *Hellins*.

HEATH J. It ſeems to me that the caſe cited from *Salkeld* has no application to the preſent. There the only queſtion related to the place where the cattle were taken, whereas here the diſpute between the parties turns upon the cauſe of taking the cattle.

ROOKE J. The declaration in this caſe appears to me to have been framed with a view to draw the Defendant into a difficulty. If ſo it has failed, for the avowry ſeems to me to be well pleaded.

CHAMBRE J. When the cattle of one man are taken by another, it is not very eaſy for the former to aſcertain in what place they were taken, and therefore he is allowed to allege that they were taken in whatever place he finds the other in poſſeſſion of them. Now here the declaration having alleged a taking in the cloſe called *Claygate*, the avowry alſo ſets forth a taking in *Claygate*, but ſhews what kind of a taking that was. With reſpect to the caſe in *Salkeld*, there was no taking at all in the place laid in the declaration, and when the Defendant had pleaded in abatement to the place, and put in a formal conuſance *pro retorno habendo*, it is moſt clear that the Plaintiff had no right to traverſe the matter of the conuſance. But in this caſe the Plaintiff was at liberty to traverſe any part of the avowry which he might think proper.

Shepherd then applied to the Court for leave to amend;

But *The Court* being of opinion that the demurrer was frivolous, refuſed his application, and gave

Judgment for the avowant (*a*).

June 23d.

HENRY SMITH *v.* SAMUEL WHALLEY and THOMAS ALLPORT.

An agreement between parties to a ſuit in Chancery binding themſelves, their executors, and adminiſtrators, made an order of that Court and acted upon therein as ſuch, may be the ground of an *aſſumpſit* at law.

ASSUMPSIT on a ſpecial agreement. The cauſe coming on to be tried at the Sittings after *Eaſter* Term before Lord *Alvanley* Ch. J. a verdict was found for the Plaintiff for 754 *l.* 3 *s.* 8 *d.* ſubject to the opinion of this Court upon a caſe which ſtated in ſubſtance as follows.

A cauſe being depending in the Court of Chancery, in which *John Doyley* was Plaintiff, and *Henry Smith* (the preſent Plaintiff), *John Dunkin*, and *Edward Glover*, Defendants, an agreement was entered into between the Plaintiff and Defendants, entitled as follows: "In Chancery. Between *John Doyley* Plaintiff, *Henry Smith*, *John Dunkin*, and *Edward Glover*, Defendants." The agreement recited an order of the Chancellor for the payment of certain ſums of money lodged in the Bank to the credit of the cauſe, and that one *Charles Harriſon*, former ſolicitor in the cauſe (ſince become a bankrupt) ſhould deliver his bill of fees, and that it ſhould be referred to a maſter to tax the ſame, till which time payment ſhould be reſerved; and further reciting, that a bill had been delivered, whereby there appeared to be a balance of 1601 *l.* 5 *s.* due from the ſaid *Henry Smith* to *Samuel Whalley* and *Thomas Allport*, aſſignees of the ſaid *Charles Harriſon*, ſubject to taxation not then made; and further reciting, that a further ſum had lately

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(*a*) See note 1. by *Williams* Serjt. on the caſe of *Potter* v. *North*, 1 *Saund.* 347. from which and the authorities there cited, this avowry appears to be pleaded in the uſual manner.

ly been paid into the Bank to the credit of the cauſe, for which the ſaid *Henry Smith* had applied to the Court; and that the matter was adjourned until it could be aſcertained what the ſaid *Charles Harriſon* had received on account of his fees; and that upon the ſaid matter afterwards coming on to be heard, it was referred to *S. C. C.* Eſq. to inquire what bills of fees of the ſaid *Charles Harriſon* were a lien upon the fund, placed to the credit of the cauſe, and what the ſaid *Henry Smith* was perſonally liable to pay; and that after ſuch inquiry had, ſuch further order ſhould be made as ſhould be juſt; and further reciting, that inſtead of proſecuting ſuch inquiry, the ſaid *Henry Smith* and the aſſignees had come to an agreement that the ſum placed in the Bank ſhould be divided into equal moieties, one moiety to be paid to *Henry Smith* to his own uſe, and the other to the aſſignees on account of the fees, and in part payment of what ſhould be found due by the maſter's report; that until ſuch report all further ſums paid into the Bank ſhould alſo be divided into equal moieties, one moiety to the ſaid *Henry Smith*, and the other not exceeding, with the before-mentioned moiety, 1000 *l.* to the ſaid aſſignees, until the ſaid fees ſhould be paid, but ſubject to taxation as aforeſaid, unleſs a compromiſe ſhould take place; that if after the maſter's report there ſhould be found due to the aſſignees more than they ſhould have received, purſuant to the ſaid agreement, all further ſums to be paid into the Bank ſhould be divided in like manner until the aſſignees ſhould be paid what ſhould be reported due; that in default of ſufficient being paid into the Bank to ſatisfy the aſſignees, the ſaid *Henry Smith* ſhould pay the deficiency between the fund and the ſum reported due; that if after the report made there ſhould not be found due to the aſſignees ſo much as they ſhould have received purſuant to the agreement, they ſhould pay to the ſaid *Henry Smith* the difference between that money and the ſum reported due; that the aſſignees, in caſe they ſhould divide among the creditors of the ſaid *Charles Harriſon* the money to be received purſuant to the ſaid agreement before the maſter's report ſhould be obtained, ſhould be perſonally reſponſible to the ſaid *Henry Smith* for what money ſhould be received above what ſhould be reported due to them; that all the maters aforeſaid might be made a rule or order of the Court of Chancery, and ſhould be obeyed and obſerved as ſuch by the ſaid parties thereto; the agreement concluded with theſe words: "And for the true performance of this agreement on "the part of the ſaid *Henry Smith*, he doth hereby bind himſelf, "his

1801.

SMITH v. WHALLEY and Another.

" his executors and adminiſtrators, unto the ſaid *Samuel Whalley* " and *Thomas Allport*, their executors, adminiſtrators, and aſſigns, " and for the true performance of this agreement on the part of " the ſaid *Samuel Whalley* and *Thomas Allport*, they the ſaid *Samuel Whalley* and *Thomas Allport* do and each of them doth hereby bind themſelves and himſelf, their ſeveral and reſpective executors and adminiſtrators, unto the ſaid *Henry Smith*, his executors, adminiſtrators, and aſſigns. Witneſs their hands," *&c.* The above agreement was afterwards made a rule of the Court of Chancery, and in purſuance thereof ſeveral orders of the ſaid Court were made, directing ſums paid into the Bank to the credit of the cauſe to be divided in equal moieties between the ſaid *Henry Smith* and the aſſignees, by virtue of which the aſſignees afterwards received in the whole the ſum of 937 *l.* 12 *s.* 1 *d.* The maſter to whom the bill of fees was referred taxed the ſame at 1795 *l.* 10 *s.* 10 *d.* and alſo reported that the ſaid *Charles Harriſon* was indebted to the ſaid *Henry Smith*, in reſpect of ſums received for his uſe, 1612 *l.* 2 *s.* 5 *d.* which being deducted from 1795 *l.* 10 *s.* 10 *d.* at which he had taxed the bill, there remained due to the aſſignees, in reſpect of the ſaid bill, the ſum of 183 *l.* 8 *s.* 5d. The action was brought to recover 754 *l.* 3 *s.* 8 *d.* being the difference between the ſaid ſum of 937 *l.* 12 *s.* 1 *d.* received by the aſſignees, and the ſum of 183 *l.* 3 *s.* 5 *d.* due to them in reſpect of the bill.

The queſtion for the opinion of the Court was, Whether this action was maintainable? If the Court ſhould be of that opinion, the verdict to ſtand, and judgment to be entered for the Plaintiff. If the Court ſhould be of a contrary opinion, then a nonſuit to be entered.

Clayton Serjt. for the Defendants now contended, that the agreement on which the preſent action was brought was merely a proceeding in the courſe of a ſuit in Chancery, and that the money, if due, was only due under the order of that Court, and therefore not the ground of an aſſumpſit at common law; he cited *Emerſon* v. *Laſhley*, 2 *H. Bl.* 248. where it was held, that *aſſumpſit* would not lie to recover coſts ordered to be paid under a rule of an inferior court in the courſe of a ſuit there, even though the inferior court could not compel the party on whom the order was made to pay them, becauſe he lived out of the juriſdiction of the court; and obſerved that the preſent was an attempt for which there was no precedent.

Onſlow Serjt. *contrà* was ſtopped

By *the Court*, who ſaid, that though the general rule was clear that the mere order of another court was not a good ground of action, yet that in the preſent inſtance the Defendants had, by the terms of their agreement, raiſed a ſufficient ground of *aſſumpſit* againſt themſelves.

Poſtea to the Plaintiff.

SEALE *v.* BARTER and Another.

June 25th.

A. deviſed all his eſtates in the county of *D.* to a truſtee for 200 years to the uſe of the truſtee during the life of his ſon *J. S.* to preſerve contingent remainders, nevertheleſs to permit *J. S.* to receive the rents and profits, and after his deceaſe to the uſe of the 1ſt ſon of the ſaid *J. S.* to be begotten on the body of the woman as he ſhould happen to marry, and the heirs male of ſuch 1ſt ſon, and for want of ſuch iſſue to the uſe of the 2d, 3d, 4th, and every other ſon of *J. S.* and the heirs male of their bodies in ſucceſſion, and for want of ſuch iſſue male then to the uſe of his daughter *E. S.* her heirs and aſſigns for ever; with a reſiduary clauſe in favour of *J. S.* The teſtator afterwards made a codicil whereby he deviſed all his eſtates to his ſon *J. S.* and his children lawfully to be begotten, with power for him to ſettle the ſame by will or otherwiſe on ſuch of them as he ſhould think proper; and for default of ſuch iſſue then to his daughter *E. S.* and her children lawfully to be begotten, with a ſimilar power: and in default of ſuch iſſue to *J. S.* and *E. S.* equally between them; and he further provided that a ſettlement of 200 *per annum* ſhould be made on any woman whom his ſon ſhould happen to marry; and that his eſtates ſhould be chargeable therewith. At the time of making the codicil *J. S.* was married, but had no child. Held that the codicil was to be conſtrued independent of the will: and that under the codicil *J. S.* took an eſtate tail, with a power to ſettle the eſtates on all or any of his iſſue in ſuch way as he ſhould appoint; and thereby determine the eſtate tail ſo far as it ſhould be inconſiſtent with ſuch ſettlement.

THIS caſe was ſent by the Lord Chancellor for the opinion of the Court.

John Seale by his will, dated the 11th of *February* 1774, deviſed to his wife for life his meſſuage *Barton* farm, and demeſne lands called *Mount Boon*, (with the furniture, ſtock, &c. alſo for her life,) and an annuity of 50*l.* for her life charged upon a meſſuage called *Coombe*, with power to diſtrain in caſe of non-payment; he then deviſed to *Richard Harris* and his heirs, all his manors, lordſhips, meſſuages, lands, tenements, houſes, hereditaments, and premiſes, with their appurtenances, in the county of *Devon*, to have and to hold the ſame to the ſaid *R. H.*, his executors, adminiſtrators, and aſſigns, for a term of 200 years, without impeachment of waſte upon truſt, for the purpoſes and under the proviſoes thereinafter mentioned, and from and after the determination of the ſaid term upon truſt and to the uſe of the ſaid *R. H.* during the life of his only ſon *John Seale*, to ſupport contingent remainders, nevertheleſs to permit his ſaid ſon *J. S.* to receive the rents and profits during his life without impeachment of waſte, and from and after his deceaſe to the uſe of the 1ſt ſon of the ſaid *J. S.* to be begotten on the body of ſuch woman as he ſhould thereafter happen to marry, and the heirs male of ſuch 1ſt ſon lawfully iſſuing; and for want and in default of ſuch iſſue then to the uſe of the 2d ſon in like manner, and ſo to the 3d, 4th, and every other ſon and ſons of the ſaid *J. S.* and the heirs male of the bodies of every ſuch ſon and ſons lawfully iſſuing, the eldeſt of every ſuch ſon and ſons, and

the

1801.
SEALE
v.
BARTER
and Another.

the heirs male of his and their body and bodies always to take place and be preferred before the younger of ſuch ſon and ſons, as they and every other of them ſhould be in ſeniority of age and priority of birth; and for want and in default of ſuch iſſue male of his ſaid ſon *J. S.* then upon truſt, and to and for the only uſe and behoof of his daughter *Elizabeth Seale*, her heirs and aſſigns for ever, and to and for no other uſe, intent, and purpoſe whatſoever; and as to the ſaid term of 200 years he declared that it ſhould be lawful for the ſaid *R. H.*, when his daughter *E. S.* ſhould marry, to raiſe a portion of 4000*l.* to be paid to her, and until that time to raiſe the annual ſum of 250*l.* to be paid to her for her maintenance: after charging all his eſtates in the county of *Devon* with the payment of his debts, he deviſed all the reſt, reſidue, and remainder of his lands and tenements not thereinbefore deviſed or diſpoſed of whereof he ſhould die ſeiſed in poſſeſſion, reverſion, or remainder, to his ſon *J. S.* his heirs and aſſigns, and all the reſt of his perſonalty after payment of his debts and funeral expences, he gave to *R. H.* and made him executor of his will, deſiring him to ſee the ſame performed according to his true intent and meaning, nevertheleſs in truſt, and to and for the only uſe and behoof of his ſaid ſon *J. S.* On the 14th of *February* 1774, the teſtator made the following codicil to his will: "I *John Seale* of *Mount Boon*, within the pariſh of *Townſtall*, in the county of *Devon*, Eſq. do this 14th day of *February* 1774, make and publiſh this codicil to my laſt will and teſtament, in manner and form following: firſt and principally it is my will and meaning, and I do hereby order and direct that no inventory of my goods and effects at *Mount Boon* be taken after my deceaſe; it is likewiſe my will that all my lands and eſtates ſhall after my deceaſe come to my ſon *John Seale* and his children lawfully to be begotten, with full power for him to ſettle the ſame, or any part or parts thereof, by will or otherwiſe, on them, or any of them, as he ſhall think proper; and for default of ſuch iſſue, then that all my lands and eſtates come to my daughter *Elizabeth Seale* and her children lawfully to be begotten, with full power for her my ſaid daughter to ſettle the ſame or any part or parts thereof, by will or otherwiſe, on them, or ſuch of them as ſhe ſhall think proper; and in default of ſuch iſſue, it is my will and meaning that all my eſtates and lands ſhall belong to my ſaid ſon and daughter equally between them, to whom in ſuch caſe I do hereby give, deviſe, and bequeath the ſame: and whereas in and by my will *Richard Harris* is made a truſtee for payment

ment of my debts, legacies, and expences, I do hereby direct and order that if my ſaid ſon *John Seale* can raiſe the money otherwiſe, it ſhall be at his option. My will further is, that a ſettlement of two hundred pounds a-year ſhall be made upon any woman my ſon *John Seale* may happen to marry, and that my eſtates, or ſo much of them as he ſhall think proper, be chargeable with the payment thereof: and laſtly, it is my deſire that this my codicil be annexed to and made part of my laſt will and teſtament to all intents and purpoſes." The teſtator being ſeiſed of or entitled to conſiderable lands and tenements in the county of *Devon*, and of no other real eſtates whatſoever except a meſſuage or tenement in the pariſh of *St. Sedwell*, in the county of the city of *Exeter*, died in *September* 1777, leaving only two children (*viz.*) the ſaid *John Seale* his only ſon, and the ſaid *Elizabeth* his daughter, who was afterwards married, and is ſince dead, having left a ſon, her only child, now in minority. At the time of making the codicil *John Seale* the teſtator's ſon was married, but had no child, but afterwards in *February* 1777, in the teſtator's lifetime, *John Seale* the ſon had a daughter born, his eldeſt child (who is now living and lately married), and he has ſince had ſeveral other children, of whom his eldeſt ſon is now in minority.

The queſtion for the opinion of the Court was, What eſtate or intereſt did the Plaintiff *John Seale*, the ſon of the ſaid teſtator, take under the ſaid will and codicil?

The caſe was twice argued; firſt in *Hilary* Term laſt, by *Beſt* Serjt. for the Plaintiffs, and *Bayley* Serjt. for the Defendants; and again in this Term, by *Shepherd* Serjt. for the former, and *Lens* Serjt. for the latter.

Arguments for the Plaintiffs. *John Seale* the ſon of the deviſor took an eſtate in tail general, remainder in tail general to *Elizabeth Seale*, remainder in fee to the ſaid *John* and *Elizabeth Seale* as tenants in common. The queſtion in this caſe turns upon the expreſſions introduced into the codicil, by which the teſtator deviſes all his lands and eſtates to *J. S.* and his children lawfully to be begotten, with full power for him to ſettle the eſtates, or any part or parts thereof, by will or otherwiſe on them or ſuch of them as he ſhall think proper; and for default of ſuch iſſue then, that the eſtates ſhall go to his daughter *E. S.* and her children lawfully to be begotten, with the ſame power as to the ſon; and in default of ſuch iſſue, to *J. S.* and *E. S.* equally between them. Unleſs theſe

1801.

SEALE *v.* BARTER and Another.

expreſſions be conſtrued in the way contended for by the Plaintiffs, it does not ſeem that the intention of the teſtator will be effectuated; and indeed the authorities applicable to the words of this codicil call for ſuch a conſtruction. A deviſe to a man and his children or iſſues, if he hath not any iſſue at the time of the deviſe, is ſufficient to give an eſtate tail; for otherwiſe the children could not take. *Wyld's* caſe, 6 *Co.* 16, 17. Now, in the preſent caſe, at the time of the deviſe made, *J. S.* had no children. So in 1 *And. pl.* 110. a deviſe of land to one for life, and after his deceaſe to the men children of his body, and if he died without men children of his body then over, was held to give an eſtate in tail male. Indeed all the caſes in which the words "ſons," or "children," or "iſſue," have been uſed to deſcribe the limitation, and an eſtate tail has been raiſed by the Court, are authorities to ſhew, that in this caſe alſo an eſtate tail muſt be raiſed. In *Sonday's* caſe, 9 *Co.* 128. where a deviſe was to *T.* and if he marry then his ſon to have the eſtate, and if he have no iſſue male, then over to another perſon, *T.* took an eſtate tail. And in *King v. Melling*, 1 *Vent.* 216. 225. 2 *Lev.* 58. *S. C.* a deviſe to *Bernard Melling* for his life, and after his death to the iſſue of his body, was held to give him an eſtate tail. And though in that caſe there was a power to *B. M.* to make a jointure of all the premiſes to a ſecond wife, Lord *Hale* was of opinion that that circumſtance did not defeat the eſtate tail, which affords an anſwer to any argument which may be raiſed from the power given in this caſe. So in *Wharton* v. *Greſham*, 2 *Bl.* 1083. the words to *J. W.* and his ſons in tail male, and in default of ſuch iſſue over gave to *J. W.* who had no iſſue at the time of the deviſe, an eſtate in tail male. In the preſent caſe the deviſe is to *J. S.* and his children, and in default of ſuch iſſue then only is it to go over; which ſhews that the children were intended to take an eſtate of inheritance, which they could not do but through their father, nor through him unleſs he took an eſtate tail. In *Davies* v. *Stevens*, *Doug.* 320. there was a deviſe of the fee ſimple and inheritance to *William* and his child or children for ever; and Lord *Mansfield* ſaid the meaning is the ſame as if the expreſſion had been to *William* and his heirs, that is to ſay, his children or his iſſue. The words "for ever" make no difference, for *William's* iſſue might laſt for ever. Now if in that caſe the word "children" was held ſynonymous to iſſue in order to reſtrain the deviſe to an eſtate tail, there is no reaſon why in

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this caſe it may not be held to bear the ſame ſenſe, in order to enlarge the deviſe to an eſtate tail. The general intention of the teſtator was, that the eſtate ſhould not go over to *L. S.* until after an indefinite failure of the iſſue of *J. S.*; but if the word "children" is held to be a mere *deſignatio perſonæ*, though there was no child *in eſſe* at that time, what is there to give to the children any thing more than eſtates for life? The intent of the teſtator, therefore, can only be effectuated in two ways; namely, by giving an eſtate tail to *J.* S. or by implying croſs remainders between the children. In order to do the former by implication, the Court have gone great lengths, as in *Robinſon* v. *Robinſon*, 1 *Burr.* 38. *Roe d. Dodſon* v. *Grew*, 2 *Wilſ.* 322. *Hodges* v. *Middleton*, *Doug.* 431. *Daintry* v. *Daintry*, 6 *Term Rep.* 370. *Doe d. Candler* v. *Smith*, 7 *Term Rep.* 531. and *Doe d. Cock* v. *Cooper*, 1 *Eaſt* 229. But croſs-remainders among the children cannot be raiſed without raiſing a previous eſtate of inheritance, which in this caſe cannot be done, except through the medium of *J. S.* the deviſee, and which when done eſtabliſhes the Plaintiff's title. In all the caſes in which croſs-remainders have been implied, there has been that preliminary ſtep which will be wanting in this caſe, unleſs *J. S.* be held to take an eſtate tail, *viz.* a previous eſtate of inheritance. *Holmes* v. *Reynell*, *Sir T. Ray.* 452. *Pollexf.* 425. *Skin.* 17. *Sir T. Jones*, 172. *S. C.* *Wright* v. *Holford*, *Cowp.* 31. *Doe d. Atherton* v. *Pye*, 4 *Term Rep.* 710. and *Phipard* v. *Manſfield*, *Cowp.* 797.

Arguments for the Defendants. If the queſtion in this caſe were, whether particular expreſſions not ſufficiently formal in their nature might not be ſo modelled as to prevent the eſtate going over contrary to the intent of the teſtator, then the caſes cited might apply. But in order to induce the Court to put ſuch a conſtruction upon this will, that has been aſſumed in argument which does not neceſſarily appear, namely, that the teſtator meant his eſtate to go in ſucceſſion. The better conſtruction of the deviſe ſeems to be, that *John Seale* took an eſtate for life, with remainder in fee to him and his ſiſter *Elizabeth Seale*, depending upon the two contingencies, either of *John Seale* or of *Elizabeth Seale* having children. By the codicil a power is given to the deviſee to ſettle the eſtate or any part thereof on ſuch of the children as he ſhall think proper. Now if this be the caſe, why ſhould the Court labour to effectuate a ſuppoſed intereſt of the teſtator to create an eſtate tail, when the power veſted in the deviſee enables him to put an end to all the conſequences reſulting from ſuch an eſtate. But if this mode of conſtruction be objectionable, ſtill it may be held that *J. S.* took an eſtate to himſelf for life, with remainder in fee to his children, if he had any, for it is not limited to all the children, but to ſuch of them as *J. S.* ſhall appoint; and in ſeveral caſes the word "eſtates" has been held to convey a fee. Indeed in this caſe the probability of the word "eſtates" being uſed in that view, is particularly ſtrong, becauſe in the ultimate remainder to *J. S.* and *E. S.* which appears clearly to have been intended to be a remainder in fee, the word "eſtates" is again uſed, and no other word capable of carrying a fee. With reſpect to the caſe of *King* v. *Melling*, the power introduced there was only a power to jointure, which is very different from ſuch a power as this to limit the whole eſtate: although the power therefore in that caſe was held not to defeat the eſtate tail, yet it is no authority in the preſent inſtance. It is obſervable alſo that the teſtator has had no anxiety to prevent the eſtate from being ſplit into different portions, ſince the ultimate remainder in fee being given to *J. S.* and *E. S.* the heirs of both, and not the heirs of one only, would ultimately be entitled to take. In order to aſcertain the intention of the teſtator, it is neceſſary to look at the will, which is dated only three days prior to the codicil. In the will the Teſtator gives to *J. S.* an eſtate for life only, with limitations to his children in ſtrict ſettlement. Now the only alteration which appears to have been intended by the codicil, is that of enabling *J. S.* to determine in what manner his children ſhould take, but not to enlarge the eſtate originally deviſed to *J. S.* himſelf. It is not neceſſary to go through all the caſes which have been cited: ſince moſt of them only diverſify the principle which was laid down in *King* v. *Melling*, and *Robinſon* v. *Robinſon*, namely, that the general intent of the Teſtator ſhall prevail, where that intent is apparent. In this caſe no ſuch intent as is contended for by the other ſide being apparent, the Court will allow the words to operate as they ſtand. Indeed if it were neceſſary that croſs-remainders ſhould be raiſed in this caſe, there are words ſufficient for that purpoſe, namely, "in default of ſuch iſſue:" and it is not neceſſary in ſuch caſe that the children ſhould take an eſtate of inheritance through the father, for croſs-remainders may be raiſed where the father takes only an eſtate for life. In the caſe of *Doe d. Davy* v. *Burnſall*, 6 *Term Rep.* 30. and *ante*, vol. i. p. 215. the deviſe was ſomewhat ſimilar to the preſent, being to *M. O.* and the iſſue of her body as tenants in common, but in default of ſuch iſſue then over, in which caſe *M. O.* was held to take only an eſtate for life, with contingent remainders to the iſſue of her body. In *Goodright* v. *Dunham*, *Doug.* 267. Lord *Mansfield* ſays, 'the words "in caſe he dies without iſſue" being tacked to the preceding clauſe (by which the teſtator had deviſed to his ſon for life, and after his death to all and every his children equally, and to their heirs) muſt mean the ſame thing as in caſe he die without children.' So in this caſe the words "ſuch iſſue" muſt mean ſuch children as he had before mentioned; which deſtroys the only argument rom which an eſtate tail can be inferred.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord Alvanley Ch. J. who after ſtating the will proceeded thus:—Under this will the eſtate was given to the teſtator's ſon for life, with remainder in tail male to his children by any after-taken wife, remainder to the teſtator's daughter in fee. This will is ſtated in the caſe to bear date on the 11th of *February* 1774; and the caſe further ſtates, but whether accurately or not I much doubt, that on the 14th of *February* 1774, only three days after the date of the will, the teſtator made the codicil in queſtion. It is ſtated that at the time when the teſtator made this codicil, *John Seale* the teſtator's ſon was married, which ſeems to exclude the idea of his having been married at the date of the will, and indeed the expreſſion in the will reſpecting children by any woman whom the teſtator's ſon ſhould thereafter happen to marry, implies that no marriage was in immediate contemplation at the time when that will was made. It is alſo ſtated that at the time when the codicil was made the teſtator's ſon had no children, but that afterwards during the teſtator's life he had children, of whom the eldeſt is now in minority. The queſtion ſubmitted to this Court by the Lord Chancellor is, What eſtate the teſtator's ſon *John Seale* took under the will and codicil? Notwithſtanding the apparent inaccuracy in the ſtatement of dates, it will not appear material that the caſe ſhould be altered when the grounds are known upon which we all concur in thinking that the teſtator's ſon took an eſtate tail. If we could by any poſſibility have referred the limitation in the codicil to the will, ſeeing the diſpoſition made in the latter to the children of the teſtator's ſon, we ſhould have been deſirous to apply

1801.
SEALE
v.
BARTER
and Another.

ply the word "children" in the codicil, to the ſame children who are deſcribed in the will; and ſhould have been inclined to ſuppoſe that the teſtator did not intend by the codicil to diſturb the diſpoſitions of the will, but only to give a power to his ſon to ſettle the eſtates upon ſuch of the children mentioned in the will as he ſhould think proper. And when I firſt read this caſe I was inclined to think that the true conſtruction. But on further conſideration I think that cannot be the caſe: for by the will the teſtator had only given an eſtate in tail male to the firſt and other ſons of his ſon, with a remainder in fee to his daughter, without any particular limitation to the daughter's children: and when we find in the codicil the ſame limitation to the children of the daughter as to the children of the ſon, it is impoſſible to apply the word "children" in the codicil to the ſame perſons who are deſcribed by that word in the will. We are therefore of opinion that the codicil muſt be taken independent of the will; and that it is no longer to be conſidered as a codicil but as a ſubſtantive will: and the only queſtion remaining for our conſideration is, What eſtate the teſtator's ſon took under the words of that codicil? It has been inſiſted on the part of the Plaintiff that the words of the codicil convey an eſtate tail: and *Wylde*'s caſe (which is the leading caſe upon this ſubject) was cited and relied on. I will ſhortly ſtate that caſe as it is reported in 6 *Co.* 16. and in *Moore* 397. under the name of *Richardſon* v. *Yardley*: for though the titles of the caſes are different, and one is ſtated to have been in the 41 *Eliz.* and the other in the 37 *Eliz.* it is hardly poſſible to conſider them as different caſes, eſpecially as the name of *Wylde* occurs in both, and the circumſtances are ſo nearly the ſame: and indeed in ſome books where the report in *Moore* has been cited, it has been ſaid that the ſame caſe was better reported in *Coke*. According to the report in *Coke*, the deviſe was of land to *A.* for life, remainder to *B.* and the heirs of his body, remainder to *Rowland Wylde* and his wife, and after their deceaſe to their children; *Rowland* and his wife then having a ſon and a daughter. It was reſolved that *Rowland Wylde* and his wife took only joint eſtates for their lives: but a caſe was there put as good law, that if *A.* deviſe to *B.* and his children or iſſues, and he hath not any iſſue at the time of the deviſe, the ſame is an eſtate tail; and a caſe is cited from Serjeant *Bendloes'* Reports, which was a deviſe to huſband and wife, and the men children of their bodies begotten, and it did not appear in the caſe that they had any iſſue male at the time of the deviſe, and therefore it was adjudged that they had an eſtate tail to them and the heirs of their bodies. According to the report in *Moore*, *Popham* and *Gawdy* held that *Wylde* took an eſtate tail, notwithſtanding that he had children living at the time of the deviſe, though *Fenner* and *Clench* thought it was only an eſtate for life. It appears therefore that two of the Judges were diſpoſed to think that an eſtate tail would paſs even in a caſe where children were *in eſſe* at the date of the will, and they all agreed that if no children had been born it would have been an eſtate tail. The next caſe to which I ſhall allude is that of *King* v. *Melling*, where the deviſe was to *Bernard Melling* for life, and after his death to the iſſue of his body by his ſecond wife, his firſt being then alive, and for default of ſuch iſſue over, with a proviſo enabling *Bernard Melling* to make a jointure on his ſecond wife; there *Rainsford* and *Twyſden* Js. held that *B. Melling* took only an eſtate for life, but *Hale* Ch. J. thought that it was an eſtate tail, and his opinion was afterwards confirmed by all the Judges in the Exchequer Chamber. The caſe referred to in the argument from *Anderſon*, and *Sonday*'s caſe are alſo authorities in favour of an eſtate tail: indeed in the latter caſe ſome argument aroſe on the clauſe introduced into the will reſtraining alienation, but it was held to make no difference. I now come to the caſe of *Wharton* v. *Greſham*, which appears to me to be very applicable to the preſent. It was there argued by Serjeant *Glynn* that there was a difference between the words "children" and "ſons," the former implying future progeny, the latter not. But the Court were clear, upon the authority of *Wylde*'s caſe, and that in *Anderſon*, and *Sonday*'s caſe, that *John Wharton* (who at the time of the deviſe had no iſſue) took an eſtate tail under a deviſe "to *J. W.* and to his ſons in tail male, and in failure of ſuch iſſue then over." Now in that caſe there was ſome reaſon to ſuppoſe that the teſtator intended to give an eſtate tail to the ſons as purchaſers: but the Court thought that the words "in failure of ſuch iſſue" were not to be reſtrained to the ſons, but muſt include all the male poſterity of *J. W.* who muſt therefore take an eſtate tail. The doctrine laid down in the famous caſe of *Robinſon* v. *Robinſon*, as well as the words of the deviſe, bear ſtrongly on the preſent queſtion. Notwithſtanding the deviſe was expreſsly limited to *Launcelot Hicks* for life, yet as it appeared that the teſtator by the words "ſuch ſon as he ſhould have," meant to embrace all his male iſſue, the Court of *King's Bench* held that *L. H.* took an eſtate tail. It is true that there was ſome difference of opinion reſpecting the deciſion of that caſe: but when carried into error the judgment of the *King's Bench* received the final approbation of the Houſe of Lords. So in *Roe d. Dodſon* v. *Grew*, where the deviſe was to *George Grew* for life, and after his deceaſe to the iſſue male of his body, he having no iſſue at the time when the will was made, *George Grew* was held to take an eſtate tail. The only other caſe which I ſhall mention is *Hodges* v. *Middleton*. There the deviſe was to Mrs. *Ann Middleton* for life, and at her death to her children. Now it appears from the caſe that Mrs. *Middleton* had ſeven children at the death of the teſtatrix, and it is ſingular enough that Serjeant *Hill* in arguing for the Plaintiff obſerves, that as the date of the will was only one year previous to the death of the teſtatrix, probably there were children of Mrs. *M.* *in eſſe* at the date of the will. Now if there were children *in eſſe* at the date of the will, and that there were appears pretty clear, that caſe is particularly ſtrong, for the Judges certified that they were inclined to think that under the will Mrs. *M.* took an eſtate tail (*a*). On the part of the Defendants it has been contended, that admitting the general doctrine that a deviſe to a man and his children, he having no children at the time of the deviſe, muſt embrace all the poſterity of the deviſee, yet that it appears from the circumſtances of this particular caſe that the teſtator did not intend ſo to limit his eſtate: and in the courſe of the argument the power given to *John Seale* to ſettle the eſtate on ſuch of his children as he ſhould think proper was mainly relied upon, and contended to be inconſiſtent with a deviſe of an eſtate tail to *John Seale* himſelf. It was urged that the power would be altogether unneceſſary if an eſtate tail were already given, ſince it would be in the power of the tenant in tail to diſpoſe of the whole eſtate in ſuch manner as he ſhould think fit, by cutting off the entail. But it may be obſerved that the power had ſome operation, ſince it enabled the deviſee to diſpoſe of the eſtate to his children without going through the forms of a recovery. Independent however of the operation of this power, I think there is a fallacy in the argument: for it ſuppoſes that the

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(*a*) Lord Chief Juſtice *Willes* in delivering the judgment of the Court in *Ginget d. White* v. *White*, *Willes* 353. (in which caſe moſt of the authorities cited in the preſent caſe are commented upon), makes this obſervation on *Wylde*'s caſe: "If a deviſe be to *A.* and his children, if there be no children then in being it gives an eſtate tail, becauſe the deviſe is in words *de præſenti*, and there being no children they muſt take by way of limitation; but if a deviſe be to *A. and after his deceaſe* to his children, *A.* has only an eſtate for life, becauſe then the words plainly ſhew that the children were intended to take by way of remainders." With this latter poſition, the opinion of the Court in *Hodges* v. *Middleton* ſeems inconſiſtent.

teſtator knew the legal conſequences of all the words which he had uſed, and all the privileges attached to a tenancy in tail. The ſame argument was urged in the great caſe of *Perryn* v. *Blake;* and in the Exchequer Chamber Mr. Baron *Perrot* expoſed the fallacy of it: and it was agreed that a teſtator cannot be preſumed to know the different privileges annexed to the ſeveral eſtates of tenant for life or tenant in tail. The true queſtion to be conſidered is, whether the teſtator meant to give the eſtate to *John Seale* and his poſterity? Probably if it had been aſked of the teſtator whether he meant that his ſon ſhould have a power to defeat the limitation, he would have anſwered, that he did not underſtand the effect of an eſtate tail, but that he wiſhed the eſtate to go to his ſon and his poſterity. If he meant to give his eſtate to his ſon and his poſterity generally, it is an eſtate tail; on the other hand, if he meant to give it firſt to his ſon, and afterwards to ſelect the ſons and daughters of his ſon in order to give the eſtate to them, the ſon took only an eſtate for life. Now we are of opinion upon all the authorities, that the words " children lawfully to be begotten," in this caſe, are not to be conſidered as words of purchaſe, but that the intention of the teſtator was to give his eſtate to his ſon and the iſſue of his body generally. And though perhaps the power would not have been added had the teſtator known the full effect of the words which he has uſed, yet we do not think the power ſufficient to control the effect which, according to the authorities referred to, has always been given to thoſe words. We give no opinion what would have been the caſe if there had been children born at the time of the deviſe. We ſhall make a certificate to the Lord Chancellor, that *John Seale* under the codicil took an eſtate tail, with a power of appointment annexed.

Accordingly the following certificate was afterwards ſent to the Lord Chancellor:

" We have heard the arguments of Counſel upon this caſe, and are of opinion that under the codicil *John Seale* the ſon took an eſtate tail in the teſtator's real eſtates, with a power by deed or by his laſt will to ſettle the ſaid eſtates, or any part thereof, upon all or any of his iſſue, for ſuch eſtates and intereſts as he ſhould thereby appoint, and thereby to determine the eſtate tail deviſed to him by the teſtator, ſo far as the ſame ſhould be inconſiſtent with ſuch ſettlement.

ALVANLEY.
J. HEATH.
G. ROOKE.
A. CHAMBRE."

1801.

June 25th.

Simpson *v.* Scales.

If an act of Parliament for encloſing and allotting the common and waſte lands of a pariſh through which a navigable river flows, empower Commiſſioners to ſet out ſuch public and private roads and ways as they ſhall think neceſſary, and direct that all roads and ways not ſo ſet out ſhall be deemed part of the lands to be allotted; an ancient towing path upon the bank of the river, though not ſet out by the Commiſſioners, ſtill ſubſiſts, for it is not within their juriſdiction.

Trespass for taking and impounding the Plaintiff's horſe drawing certain boats at *Northwold* in the county of *Norfolk.* Plea that a certain cloſe called *Arminghay Hill* (the *locus in quo*) was the freehold of the Defendant, and that the horſe was there taken damage feaſant. Replication, that the ſaid cloſe from time whereof, *&c.* hath lain open and adjoining to a certain river called the *Wiſſey*, the ſaid river being a navigable river between *Stoke* and *Hilgay*, and that the owners of boats, *&c.* navigating the ſame have been accuſtomed to paſs and repaſs in, through, and over the ſaid cloſe with their horſes, *&c.* for the purpoſe of haling and towing the ſaid boats along the ſaid river. Wherefore the Plaintiff entered the ſaid cloſe with the ſaid horſe for the purpoſe of haling and towing the ſaid boats for the more convenient navigation of the ſaid river; when Defendant of his own wrong took the horſe. Rejoinder, taking iſſue on the right of way. Verdict for the Plaintiff, with 40*s.* damages, ſubject to be reduced to one ſhilling if the Court ſhould be of opinion with the Defendant on the following caſe:

The Defendant is the occupier and owner of the cloſe mentioned in the pleadings, lying in the pariſh of *Northwold* on the north bank of the river *Wiſſey*, which is a navigable river from *Stoke* in *Norfolk* to *Hilgay* in the ſame county. On the ſouth-ſide of the river oppoſite to *Northwold* there is a regular towing-path; but for the convenient navigation of the river, it is frequently neceſſary to change the horſes from one ſide of the river to the other. The owners of boats and veſſels navigating the ſaid river have time immemorial been accuſtomed to paſs and repaſs in, through, and over the ſaid cloſe in queſtion with their horſes for the purpoſe of haling their ſaid boats and veſſels along the ſaid river, which they had conſtantly done without interruption, whenever neceſſity or convenience required; and without ſuch occaſional towing or haling it would be impoſſible to navigate the ſame. By an act of Parliament paſſed in the year 1796 for incloſing and allotting the commons and waſte lands of the pariſh of *Northwold*, the Commiſſioners therein named are directed to ſet out and appoint ſuch public and private roads and ways, and to order and direct ſuch bridges, ditches, banks, wiles, gates, bars, inlets, drains, water-courſes, and other works, as they ſhall think neceſſary and proper; and it is enacted, that when the ſaid public roads and ways ſhall be ſo ſet out, appointed, and made, it ſhall not be lawful for any perſon or perſons to uſe any other roads or ways, either public or private, within or upon the lands thereby directed to be divided and allotted, on foot, or with horſes, cattle, or carriages; and that all roads and ways which ſhall not be ſo ſet out and appointed as the roads or ways within or upon the lands thereby directed to be divided and allotted, ſhall be deemed to be part of the lands and grounds thereby directed to be divided and allotted, and ſhall be divided and allotted accordingly. The ſaid act provides, that the ſaid Commiſſioners ſhall, before the ſetting out any roads or highways in purſuance of the act, cauſe a notice of their intention, and a deſcription of all the public ways and roads intended to be ſet out and appointed by them, to be affixed upon the principal door of the pariſh church of *Northwold*, and to be inſerted in a *Norfolk* newſpaper 21 days at leaſt before ſuch roads or highways ſhould be ſet out; and if any perſon or perſons ſhould have any objection to the ſaid roads or highways, or any of them, or ſhould propoſe any other roads or highways, ſuch perſon or perſons ſhould deliver their objections or propoſals in writing to the ſaid Commiſſioners at the times therein mentioned, and that the ſaid Commiſſioners ſhould thereupon hear the allegations and evidence offered and produced to them in ſupport of the ſaid objections or propoſals; and after due conſideration thereof, ſhould ſet out and appoint all or any part of the public roads or highways deſcribed in the ſaid notice, or ſuch other public highways or roads in lieu thereof as they ſhould think fit. The Commiſſioners did ſet out and appoint certain public and private roads accordingly, which roads were made and completed; and before the ſetting out of the ſaid roads, the notice required by the act was duly given, and the other directions of the act complied with on the part of the Commiſſioners. No road was ſet out, in, or over the ſaid cloſe, and no perſon attended at any meeting of the ſaid Commiſſioners to prove a right, or to aſſert a claim to the road in queſtion. The cloſe over which this road is claimed was, before and until the paſſing of the act of Parliament, part of the commons or waſte land of the ſaid pariſh of *Northwold*, and was incloſed and allotted by the Commiſſioners under the ſaid act to the Reverend *Richard Whiſh*,

1801.

SIMPSON *v.* SCALES.

an owner of lands and commonable meſſuages within the ſaid pariſh, and was before the time, in the declaration mentioned, ſold by him for a valuable conſideration to the Defendant. The Plaintiff's horſe at the time he was taken by the Defendant was in the ſaid cloſe, and employed in haling the Plaintiff's barges on the ſaid river *Wiſſey*.

Sellon Serjt. was to have argued in ſupport of the verdict;

But *Praed* Serjt. for the Defendant being called upon by the Court, contended, that the object of the act of Parliament being to diſcharge the land to be divided from all unneceſſary burthens, this towing path, which at the time of the paſſing of the act was an exiſting public way, not having been ſet out and appointed by the Commiſſioners as ſuch, muſt now be taken to have been deemed unneceſſary by them, and ought therefore to be conſidered as part of the lands divided; that this argument was ſtrengthened by the circumſtance ſtated in the caſe, of the exiſtence of a towing-path on the other ſide of the river; and that although arguments of inconvenience might have weight in a caſe where the words of an act of Parliament were doubtful, yet that in the preſent, where the directions of the act were poſitive, ſuch arguments could not prevail.

Lord ALVANLEY Ch. J. I think there is no difficulty in the conſtruction of this act of Parliament. This act authoriſes certain Commiſſioners to encloſe certain lands, and to ſet out ſuch ways as they ſhould deem neceſſary, and to ſhut up ſuch as they ſhould deem unneceſſary. Before the paſſing of this act there was a navigable river bounded on the ſouth by encloſed lands, over which there was a towing-path, and on the north by unencloſed lands, over which the public had alſo been accuſtomed to paſs for the purpoſe of towing. The Commiſſioners have ſet out no towing path. Now it appears to me that the reaſon of this omiſſion muſt have been, that they did not conſider the matter to be within their juriſdiction. It was not the intention of the Legiſlature to empower the Commiſſioners to ſhut up one public road without ſetting out another in lieu of it. In caſes of roads it may be very eaſy to ſubſtitute one for another; and the Commiſſioners have done ſo in the preſent inſtance: but a towing-path can exiſt no where but upon the bank of the river. It would therefore be monſtrous to hold the public precluded from their right to paſs along the north bank of this river, when it neither appears to have been the intention of the Legiſlature to empower the Commiſſioners to interfere with that right, nor do the Commiſſioners themſelves appear to have had the towing path in their contemplation when they proceeded to make their allotment.

HEATH J. This power of ſhutting up ways was given to the Commiſſioners, in order to prevent the waſte of ground ariſing from a multiplicity of roads. But it never was intended to include the towing path in that general power; and even if it had been included, the Commiſſioners muſt have ſet out ſome other towing path in lieu of that which was taken away.

ROOKE J. This act contains the uſual ſaving of the King's rights. If therefore the Commiſſioners have ſet out no other towing path in lieu of that which before exiſted, I ſhould hold that the right of navigating this river, and of towing barges upon it, muſt ſtill be reſerved to the King. If one road be ſet out for another the public is not injured: but if the towing path be taken away the public is thereby deprived of the power of navigating the river. Suppoſing therefore that the towing path could be conſidered as falling within the words of the act, I ſhould ſtill be inclined to hold, that the right was ſaved by the exception in favour of the King, who is the protector of all theſe public rights.

CHAMBRE J. I think that concluſions from acts of Parliament againſt the rights either of the public or of individuals ought not to be enforced by too ſtrict an adherence to the letter. In my view of the caſe, it was not the intention of the Legiſlature to give any juriſdiction to the Commiſſioners reſpecting any rights of way which form part of the navigation of the river. The ways intended to be included were ways in the popular ſenſe of the word, leading from one vill to another. But this towing path is only a part of that way which conſiſts of the whole navigation of the river. The Commiſſioners have ſo conſidered it, and I think they have put the right conſtruction upon the act.

Per Curiam, Let the verdict ſtand.

(In the HOUSE OF LORDS.)

June 29th.

Between the Right Honourable MARY ELEANOR BOWES (commonly called Counteſs of STRATHMORE), by W. LYON Eſq. her next friend, - - - - - - - Plaintiff,

AND

ANDREW ROBINSON BOWES Eſq. and WM. BIRCH, HENRY BOURN, and GEORGE STEPHENS, - - Defendants.

And between ANDREW ROBINSON BOWES Eſq. - Plaintiff,

AND

The Right Honourable MARY ELEANOR BOWES (commonly called Counteſs of STRATHMORE), WM. LYON, CHS. SHUTER, RICHARD HARBORNE, JAMES SETON, MARY MORGAN, and FRANCES BENNETT, - - - Defendants.

On the appeal of the Right Honourable *John Bowes* Earl of *Strathmore*, ſon and heir of the Right Honourable *Mary Eleanor Bowes* (commonly called Counteſs of *Strathmore*), deceaſed.

A. by will deviſed " all his freehold and copyhold lands, tenements, and hereditaments," in truſt for certain purpoſes, and afterwards purchaſed new lands: he then made a codicil, whereby after reciting that he had deviſed " all his freehold and copyhold lands, tenements, and hereditaments" to the truſtees named in the will, he revoked the deviſe ſo far as it related to two of the truſtees, and deviſed his " ſaid lands, tenements, and hereditaments" to the other truſtees upon the ſame truſt; and concluded with declaring the codicil to be part of his will. Held that the after-purchaſed lands did not paſs.

GEORGE BOWES, late of *Streatlam Caſtle*, in the county of *Durham* Eſq. deceaſed, by his laſt will in writing, bearing date the 7th of *February* 1749, executed and atteſted as by law is required for deviſing real eſtates, did (among other things) give and deviſe all his freehold and copyhold manors, meſſuages, lands, tenements, and hereditaments whatſoever, not held in mortgage or in truſt for any other perſons, nor held by any leaſe or leaſes for lives, to his wife *Mary Bowes*, *Edward Gilbert* Eſq. the father of his wife, his (the teſtator's) ſiſter *Elizabeth Bowes*, his ſiſter *Jane Bowes*, and his friends the honourable Sir *Hugh Smithſon* of *Stanwick*, in the county of *York*, Baronet, and *Thomas Rudd*, of the city of *Durham*, Eſq. (whoſe truſteeſhip he afterwards revoked), their heirs and aſſigns, to the uſe of them, their heirs and aſſigns, upon ſuch truſts and to and for ſuch intents and purpoſes as thereinafter mentioned (that is to ſay), in caſe he ſhould leave any ſon or ſons born in his lifetime, or after his death, that the ſame ſhould be in truſt for his firſt and other ſons ſucceſſively in tail male; and for default of ſuch iſſue then in truſt for his daughter *Mary Eleanor Bowes*, afterwards the Counteſs of *Strathmore*, for her life, without impeachment of waſte, except wilful waſte in houſes; and after the determination of that eſtate, in truſt during her life to ſupport the contingent remainders; and after her death, then in truſt for her firſt and other ſons ſucceſſively in tail male; and for default of ſuch iſſue, then in truſt for all and every her daughters, as tenants in common, and the heirs of their reſpective bodies; with croſs remainders in tail general to the ſurviving daughter or daughters as tenants in common, in caſe of one or more of the daughters dying without heirs of their reſpective bodies; with divers remainders over. After making the ſaid will, and before making the codicil in queſtion, the teſtator purchaſed ſeveral eſtates, and particularly the ſaid teſtator, in the year 1754, purchaſed an undivided third part of a certain freehold eſtate in the county of *Durham*, which was ſold under a decree of the Court of Chancery, and was ſeiſed in fee thereof at the time of his death. The teſtator afterwards made a codicil to his will, bearing date the 20th day of *October* 1758, which, with the teſtator's ſignature and the atteſtation thereto, is in the words and figures following (that is to ſay): "Whereas by "my laſt will and teſtament, bearing date the ſeventh of *February* "1749, I have given and deviſed all my freehold and copyhold "manors, meſſuages, lands, tenements, and hereditaments what- "ſoever, not held on mortgage or in truſt for any other perſons, "nor held by any leaſe or leaſes for lives, to my dear wife *Mary* "*Bowes*, her father *Edward Gilbert* Eſq. my ſiſter *Elizabeth* "*Bowes*, my ſiſter *Jane Bowes*, my friends the Honourable Sir "*Hugh Smithſon* of *Stanwick*, in the County of *York*, Baronet, "and *Thomas Rudd*, of the city of *Durham* Eſq. their heirs and "aſſigns, and to the uſe of them, their heirs and aſſigns, upon the "truſts, intents, and purpoſes therein mentioned; now I do here- "by revoke and make void all my above deviſe, ſo far as it relates "to the above Sir *Hugh Smithſon*, now Earl of *Northumberland*, "and *Thomas Rudd*, and their heirs; and I do hereby give and "deviſe my *ſaid* lands, tenements, and hereditaments, unto the "above-named *Mary Bowes*, my ſaid wife, *Edward Gilbert*, and "my ſiſters *Elizabeth Bowes* and *Jane Bowes*, their heirs and "aſſigns, upon the ſame truſts, intents, and purpoſes as I have "given and deviſed the ſame by my ſaid laſt will; and do here-

"by revoke the legacies of five hundred pounds each, which I "have given to the ſaid Sir *Hugh Smithſon*, now Earl of *Northumberland*, and the ſaid *Thomas Rudd*. And I do hereby revoke "and make void the executorſhip of the ſaid Earl of *Northumberland* and *Thomas Rudd*, of my ſaid laſt will and the guardianſhip of my daughter, deviſed to the ſaid Earl of *Northumberland*; "and do hereby confirm and appoint my ſaid wife *Mary Bowes*, "the ſaid *Edward Gilbert*, and ſaid ſiſters *Elizabeth* and *Jane* "*Bowes*, executors of my will; and do alſo revoke and make "void the truſteeſhip of the ſaid Earl of *Northumberland* and "*Thomas Rudd*, for the laying out of the ſavings of the produce "of my real and perſonal eſtates in the purchaſing of lands; and "do hereby make and declare this codicil to be part of my laſt "will and teſtament. As witneſs my hand and ſeal, this twentieth "day of *October* one thouſand ſeven hundred and fifty-eight." Then followed the atteſtation thus: "Signed, ſealed, publiſhed, and declared by the above-named *G. B.* as a codicil or part of his laſt will and teſtament, in the preſence of us," *&c.* The teſtator died without having made any diſpoſition of the after-purchaſed eſtates otherwiſe than by the above-mentioned will and codicil, leaving the late Counteſs of *Strathmore*, his only child and heireſs at law, him ſurviving.

By an order in the above cauſes Lord *Loughborough* C. directed a caſe to be made for the opinion of the Judges of the Court of *King's Bench* upon the queſtion, Whether the codicil of the 20th of *October* 1758 was a republication of the teſtator's will of the 7th of *February* 1749 with reſpect to the eſtates purchaſed after the date of the ſaid will? The Court of *King's Bench* having anſwered this queſtion in the negative, (ſee 7 *Term Rep.* 482.) Lord *Loughborough* C. by his order in the above cauſes, in effect confirmed that deciſion. Whereupon the preſent Appellant ſubmitted that the ſaid deciſion, and order founded thereon, were erroneous, for the following among other REASONS:

1ſt, Becauſe it is clear from the will the teſtator did not mean to die inteſtate as to any part of his property, but to diſpoſe of all his real eſtates upon the truſts therein mentioned; and it is equally clear, that when he made his codicil he did not mean to die inteſtate as to any part of the eſtates he then had.

2d, That the will and codicil ought to have effect according to the intention of the Teſtator; that the Teſtator's intention, at the time of executing both the inſtruments, was to diſpoſe of all the real eſtate which he had at the time of executing thoſe inſtruments, as well as at the time of his death. That by legal conſtruction the will could only operate upon eſtates the teſtator had at the time the will was made; but by the ſame rule, the codicil could operate upon all the eſtates the teſtator had ſubſequent to making the will, and previous to the codicil. And that the true conſtruction of the will and codicil is this, that by the will the Teſtator gave all his real eſtates to the truſtees therein named, and by the codicil he gave all his real eſtates to the ſame truſtees except two, who are thereby excluded.

3d, That in many caſes a codicil has been held to be a republication of a will, ſo as to paſs after-purchaſed eſtates, though the teſtator has not expreſſed any particular intention to republiſh his will; becauſe, according to the general underſtanding of mankind, a man making a general deviſe of all his real eſtates by his will is preſumed to intend to diſpoſe of all the real eſtates he ſhall have at the time of his death.

4th, That in the argument for reſtraining the effect of the codicil to the eſtates which the teſtator had at the time of making his will, great ſtreſs was laid upon the word "ſaid," in that part of the codicil where the teſtator deviſes the eſtates to the truſtees therein named; but upon the true conſtruction of the codicil, the word "ſaid" is of no effect, becauſe it only makes the teſtator, who had recited that he had given all his eſtates to truſtees therein named, ſay, that in like manner, by his codicil, he gave all his eſtates to the truſtees whom he therein names.

5th, That if in order to paſs the lands in queſtion it ſhould be thought neceſſary to conſider the codicil as a republication of the will, there is ſufficient in this codicil to give it that effect: the teſtator declares the codicil to be a part of his will; and in the atteſtation it is mentioned that he publiſhes it as part of his will. If the codicil is ſo to be taken, it ought to have the ſame effect as if the teſtator had in the codicil tranſcribed his will, excluding only two of his truſtees, and then it would have been in terms a deviſe to the truſtees whom he choſe to continue of all the eſtates which he had at the time of executing the codicil.

J. Mansfield.
E. Law.

The reſpondents hoped that the opinion of the Court of *King's Bench* and the order of the Lord Chancellor founded thereon, would be confirmed and eſtabliſhed, for the following among other

REASONS:

1ſt, Becauſe the expreſſion contained in the codicil, bearing date the 20th day of *October* 1758, by which the teſtator deviſed his ſaid lands, tenements, and hereditaments in the manner thereinafter mentioned, manifeſtly confines the deviſe to ſuch lands, tenements, and hereditaments as he was ſeiſed of at the time when he publiſhed his will, bearing date the 7th day of *February* 1749, and can by no poſſibility of fair grammatical import be conſtrued to extend to lands purchaſed after the date of the will.

2d, Becauſe no caſe can be found in which an expreſſion in a codicil ſo qualified, has been conſtrued to extend to after-purchaſed lands. All the caſes relied on by the other ſide plainly diſcover an intention to deviſe after-purchaſed eſtates, and contain words ſufficiently comprehenſive to paſs them.

3d, Becauſe, if ſuch a conſtruction were admitted, it would have the effect of diſinheriting the heir at law, by words of doubtful, if not overſtrained implication, which courts of law will never allow to be done by any thing ſhort of an intention ſignified in the moſt expreſs and unequivocal terms. Many reaſons might exiſt why the teſtator ſhould leave certain parts of this eſtate in the diſcretion of the heir at law. Thoſe reaſons, without doubt, influenced his mind, otherwiſe it is impoſſible to ſuppoſe that he would not in direct and explicit terms have deviſed the after-purchaſed eſtates, eſpecially when it is conſidered how technically and particularly his will is worded.

4th, Becauſe, upon reading the codicil, it moſt clearly appears that the ſole purpoſe of the teſtator in making it, is to revoke the truſts contained in the will, ſo far as they relate to two particular truſtees; for the ſame eſtates are deviſed upon the ſame truſts, and to the ſame truſtees, with the excluſion only of thoſe two perſons, in reſpect of whom the deviſe contained in the will is expreſsly declared to be revoked and made void. In ſhort, it is manifeſt that the teſtator's object in making the codicil was neither more nor leſs than to ſtrike out of his will the names of Sir *Hugh Smithſon* and *Thomas Rudd*, and that if thoſe gentlemen had not been originally named as truſtees and executors in the will, the codicil never would have been made.

T. Erſkine.
J. Raine.

This caſe was argued at the bar of the Houſe of Lords on two ſeveral days by the Attorney-General (*Law*) and *Mansfield* for the

Appellants, and by *Erſkine* and *Raine* for the Reſpondents. On the laſt day of argument (the 29th of *June*) the Lord Chancellor put the following queſtion to the Judges, *viz.* Whether by the legal conſtruction of the codicil of the teſtator *George Bowes*, bearing date the 20th of *October* 1758, and by him declared to be part of his laſt will and teſtament dated the 7th day of *February* 1749, the real eſtate purchaſed after he made his will paſſed to the uſes and upon the truſts, intents, and purpoſes mentioned in the ſaid will?

Macdonald Ch. B. having conferred with the reſt of the Judges preſent (*a*) upon the ſaid queſtion, delivered their unanimous opinion in the negative.

After the Judges had thus given their opinion, a debate took place in the Houſe, in which Lord *Thurlow* differed in opinion from the Judges. His Lordſhip obſerved that a republication of a will of lands had always been held to ſpeak as of the time of the republication, and that he knew no inſtance in which that rule had been departed from, and that this caſe muſt be decided upon reference to the principles upon which former caſes had proceeded; That though it was true that where there was a particular deſcription of lands deviſed no ſubſequent codicil could extend to after-purchaſed lands, unleſs by particular reference to thoſe lands, yet that in ſuch caſe it was only the particular deſcription of the lands which defeated the effect of the republication; That this diſtinction would be found to reconcile all the caſes in which there was any appearance of difference; and the only queſtion in this as in all other caſes would be found to be, Whether the republication were general, or whether it were controlled by particular expreſſions? and that, indeed, in this very caſe, ſuch ſeemed to have been the opinion of the Court of *King's Bench*, for in the certificate it was expreſſed that this codicil was not that ſort of republication which would paſs the lands in queſtion; That if the teſtator had diſcovered any anxiety in the will, it was to convey all the eſtates of which he was poſſeſſed; That the bequeſt in the will was as ample as poſſible; That the teſtator began the codicil by referring to the largeneſs of the former deviſe, where he ſaid, "whereas by my laſt will and teſtament I have given and deviſed *all* my freehold and copyhold," &c.; That this reference, unreſtrained by any thing, would clearly have been ſufficient to paſs the after-purchaſed lands, and

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(*a*) *Hotham* B. *Heath* J. *Thompſon* B. *Rooke* J. *Le Blanc* J. and *Graham* B.

1801.

Bowes and Others *v.* Bowes and Others.

and that probably the whole difficulty had ariſen from the teſtator being miſtaken in point of law, and thinking that his after-purchaſed lands did paſs by the firſt deviſe; That his general intent appeared to have been, that the rents and profits of all his eſtates ſhould be laid out in the purchaſe of new lands, and yet the Houſe muſt negative this general intent before they could decide in favour of the reſpondents; That it appeared to him that the teſtator muſt be underſtood to ſay, whereas I have conveyed all my lands (including thoſe purchaſed ſubſequent to the date of the will), I deviſe my *ſaid* lands, referring to what he ſuppoſed he had conveyed; and that in this view of the caſe the introduction of the word "ſaid" would not control the operation of the codicil.

The Lord Chancellor (Lord *Eldon*) ſupported the opinion of the Judges, ſaying, that although a republication of a will of lands certainly ſpeaks as of the time of the republication, yet that in all caſes of this kind which had come before the Courts for deciſion, the only queſtion had been, whether the particular caſe was or was not within the general rule. His Lordſhip obſerved that it could not be denied that other circumſtances than thoſe of locality in the deſcription of the lands deviſed, were ſufficient to control the effect and operation of a codicil, and that wherever a queſtion had ariſen whether the operation of the codicil were controlled or not, thoſe who had to ſolve the queſtion had uſually done ſo by ſatisfying themſelves reſpecting the intent of the teſtator; That this teſtator's intention in the will clearly was to raiſe a fund to be applied to certain uſes, but that poſſibly the undivided quality of the eſtate which he purchaſed in 1754 might be a reaſon inducing him not to paſs that eſtate with the others; That however poſſible it might be that the teſtator might not be acquainted with the legal effect of his will, ſtill he thought that the Houſe ought to decide this queſtion as if the teſtator actually did know that the will of 1749 had not paſſed the after-purchaſed lands; That when in the codicil he referred to the will as having paſſed all his lands, he did no more than recite his former deviſe, but that when he came to the operative part of the codicil he changed the tenſe of the verb; and though in the former part he ſaid, "whereas I have deviſed," &c. in the latter part he ſaid, "I do hereby revoke," &c. and "I do hereby give and deviſe," &c.; That if therefore by the former words of the codicil, "all my freehold and copyhold lands," the teſtator were underſtood to include all the after-purchaſed

1801.

Bowes and Others v. Bowes and Others.

lands, by the latter words of the codicil he muſt be underſtood to be revoking a deviſe of theſe lands which he had not at the time when the will was made; for his expreſſions of revocation were co-extenſive with the expreſſions of deviſe; That theſe expreſſions therefore, unleſs explained by the context, would be unintelligible; but that the word "ſaid" clearly ſhewed that they were both intended to be confined to the lands which the teſtator poſſeſſed at the time of the will, and that this conſtruction rendered them conſiſtent; That the intent of the teſtator (if it could be diſcovered) was the clue by which the Houſe ought to direct itſelf; and though in the preſent caſe that intent could not be poſitively aſcertained, yet that ſome caſes might be put to illuſtrate the danger of the doctrine contended for on the part of the reſpondents; for ſuppoſing the teſtator at the time of making his will to have been poſſeſſed of lands to the amount of 100*l. per ann.* only, and between that time and the time of making the codicil to have purchaſed lands to the amount of 10,000*l. per ann.* it would ſeem impoſſible to contend that by a mere reference to a deviſe of ſo ſmall a part of the property he intended to paſs ſo conſiderable an eſtate; That the true queſtion ſeemed to be, whether from the words "my ſaid lands" a ſpecial intention to exclude the after-purchaſed eſtate did not appear, in the ſame way as it would have appeared, had he referred to the lands originally deviſed by a deſcription of locality; but that, indeed, if their Lordſhips were not ſatiſfied that ſuch a ſpecial intention did appear, the general rule reſpecting the operation of a republication muſt operate in favour of the Appellants.

The Earl of ROSSLYN (late Lord *Loughborough* Chancellor) and Lord ALVANLEY, Chief Juſtice of the Common Pleas, alſo ſpoke ſhortly in ſupport of the opinion of the Judges.

The LORD CHANCELLOR then moved that the appeal might be diſmiſſed and the order therein complained of be affirmed; which motion paſſed in the affirmative without a diviſion.

The King *v.* John Egginton, Walter Egginton, Thomas Gibbons, John Foulds, and Wm. Foulds.

Indictment for a burglary laid in the 1ſt count to have been committed in the houſe of *M. R. B.*; in the 2d of *J. B.*, and in the 3d of *W. N.* It appeared that the place where the robbery was committed was a centre building, having two wings; that in the centre building the buſineſs of *M. R. B.*, *J. B.*, *R. N.* and ſeveral other perſons was carried on; that in part of one of the wings was the dwelling of *M. R. B.* and in the other part that of *J. B.* neither having any internal communication with the centre except by a window in the dwelling of *J. B.* which looked into a paſſage that ran the whole length of the centre; and that the other wing was occupied by *W. N.*, from which there was no communication with the centre. *Semb.* that the robbery did not amount to a burglary.

If a ſervant, being ſollicited to become an accomplice in robbing his maſter's houſe, inform his maſter thereof, who thereupon tells him to carry on the buſineſs, and conſents to his opening a door leading to the premiſes, and being with the robbers during the robbery; and alſo marks his property and lays it in a place where the robbers are expected to come, with a view to apprehend the robbers, this conduct of the maſter will not amount to a defence in an indictment againſt the robbers.

The four firſt Defendants were tried before *Lawrence* J. at the Spring Aſſizes for *Stafford* 1801, for a burglary. The 1ſt count in the indictment charged them with breaking and entering the dwelling-houſe of *Mathew Robinſon Boulton*, and ſtealing therein a quantity of ſilver and 150 guineas, laid to be the property of *Mathew Boulton* and *John Hodges*, 150 guineas laid to be the property of *Mathew Boulton*, *Mathew Robinſon Boulton*, *James Watt*, and *Gregory Watt*; 150 guineas the property of *Mathew Boulton*, *John Bonus*, and *William Nelſon*; 150 guineas the property of *Mathew Boulton*, *Benjamin Smith*, and *James Smith*; and 150 guineas the property of *Mathew Boulton*, *John Hodges*, *Mathew Robinſon Boulton*, *James Watt*, *Gregory Watt*, *John Bonus*, *William Nelſon*, *Benjamin Smith*, and *James Smith*. The 2d count laid the houſe to be the dwelling-houſe of *John Buſh*. The 3d count laid the houſe to be the dwelling-houſe of *William Nelſon*. The 4th count was for being in the dwelling-houſe of ſaid *Mathew Robinſon Boulton*, and ſtealing as above, and burglariouſly breaking the houſe to get out of it againſt the ſtatute, &c. The 5th count for being in the dwelling-houſe of *John Buſh* ſtealing the property, and burglariouſly breaking the houſe to get out of it againſt the ſtatute, &c. The 6th count for ſtealing the property as above in an outhouſe belonging to the dwelling-houſe of ſaid *Mathew Boulton* againſt the ſtatute, &c. The 7th count for ſtealing the property as above in an outhouſe belonging to the dwelling-houſe of ſaid *Mathew Robinſon Boulton* againſt the ſtatute, &c. The 8th count for ſtealing the property as above in an outhouſe belonging to the dwelling-houſe of *William Nelſon* againſt the ſtatute, &c.

On the trial it appeared that the ſilver goods were the property of *Mathew Boulton* and *John Hodges*, the money the property of the ſeveral perſons laſt mentioned in the indictment, with whom

Mathew

1801.
The King
v.
Egginton
and Others.

Mathew Boulton was concerned in different manufactories, that is to ſay, with *John Hodges* as manufacturers of plated goods; with *William Nelſon* and *John Bonus*, as button makers; with *James Smith* and *Benjamin Smith* as buckle makers; with *Mathew Robinſon Boulton*, *James Watt*, and *Gregory Watt*, as engine makers. Beſides which *Mathew Boulton* carried on two other manufactories on his own ſole account. It farther appeared that the money and part of the ſilver were kept in a counting-houſe, which was uſed for tranſacting the money concerns and keeping the accounts of all the different buſineſſes in which *Mathew Boulton* was engaged; that other part of the ſilver was in a room, being one of ſeveral where the plate buſineſs was carried on, which rooms and counting-houſe formed a centre, having two wings adjoining, conſiſting of a dwelling-houſe, inhabited by perſons engaged in *Mathew Boulton*'s manufactories; that one of them was inhabited by *Mathew Robinſon Boulton*, but that had no internal communication with the centre-building at the time of the offence being committed, a room in his houſe which communicated with the centre-building having been allotted to the purpoſes of the plating buſineſs with which he had nothing to do, the door into it was ſhut up, and a working bench placed againſt it ſo as to ſtop the paſſage; that one *Buſh* a workman of *Mathew Boulton* occupied another of the dwelling-houſes in the ſame wing, and from his houſe there was no way into the centre-building, but there was in it a window which looked into a paſſage that ran the whole length of the centre-building; that in the other wing was the dwelling-houſe of *William Nelſon*, the partner of *Mathew Boulton*, in the button buſineſs, which had no internal communication with the centre, and in that wing other perſons lived; that in the front of this building was a terrace or front yard fenced round in different ways, and at the end of the pile of building above deſcribed by a wall with gates for horſes and carriages, and a door for foot paſſengers. It further appeared that the priſoners had ſome time previous to the breaking into the centre-building applied to one *Joſeph Phillips*, who was employed as a watchman to the manufactory at *Soho*, to aſſiſt them in robbing it, to which he aſſented, and informed firſt ſome of *Mathew Boulton*'s ſervants and aſſiſtants, and afterwards *Mathew Boulton* himſelf of what was intended, of the manner and time they were to come, that they were to go into the counting-houſe, and that he was to open the door into the front-yard to the priſoners; that *Mathew*

1801.
The King
v.
Eggington
and Others.

Boulton told him to carry on the buſineſs; that Mathew Boulton was to bear him harmleſs, and that Mathew Boulton conſented to his opening the door leading to the front yard, and to his being with the priſoners the whole time; that in conſequence of this information Mathew Boulton removed from the counting-houſe every thing but 150 guineas and ſome ſilver ingots, which he marked to furniſh evidence againſt the priſoners, and lay in wait to take them when they ſhould have accompliſhed their purpoſe; that on the 23d of December, about one o'clock in the morning, the priſoners came, and Phillips opened the door into the front yard, through which they went along the front of the building, and round it into another yard behind it, called the middle-yard; and from thence they and Phillips went through a door, which was left open, up a ſtair-caſe in the centre-building leading to the counting-houſe and rooms where the plate-buſineſs was carried on; that this door the priſoners bolted, and then broke open the counting-houſe which was locked, and the deſks which were alſo locked, and took from thence the ingots of ſilver and guineas; that they then went to the ſtorey above, into a room where the plate-buſineſs was carried on, and broke the door open, and took from thence a quantity of ſilver and returned down ſtairs, when William Foulds unbolted the door at the bottom of the ſtairs, which had been bolted on their going in, and went into the middle-yard, when all except William Foulds (who eſcaped) were taken by the perſons placed to watch them.

On this caſe two points were made for the priſoners; 1ſt, that no felony was proved, as the whole was done with the knowledge and conſent of Mathew Boulton, and that the acts of Phillips were his acts. 2dly, That if the facts proved amounted to a felony, it was but ſimple larceny, as the building broken into was not the dwelling-houſe of any of the perſons whoſe houſe it was charged to be, and as there was no breaking ſince the door was left open.

The jury found the priſoners guilty, but Lawrence J. reſerved the above points for the conſideration of the Judges, before eleven of whom (abſente Lord Eldon, then Lord Chancellor as well as Lord Chief Justice of the Common Pleas), it was argued on the 9th of May laſt.

Clifford for the priſoners began by arguing the ſecond objection. The place in which the offence was committed was ſo completely ſeparated from the dwelling-houſe as not to be the ſubject of burglary. The caſe of the King v. Gibson, Mutton, and Wiggs, 1 Leach.

1801.
The King
v.
Eggington
and Others.

1 *Leach*, 396. *Ed.* 1800. which is the ſtrongeſt authority in ſupport of the propoſition that this offence is a burglary, is very diſtinguiſhable from the preſent. There the perſon in whom the property of the houſe was laid was the ſole occupier of the houſe to which the ſhop in which the offence was committed was attached, though he had leaſed part of his houſe with the ſhop to another perſon. But here though *M. R. Boulton* was the ſole occupier of the adjoining houſe in the wing of the building, yet the centre-part where the offence was committed was ſeparated from the wing, and neither belonged to nor was in the ſole occupation of *M. R. Boulton*; but was in the joint occupation of the ſeveral partners in the buſineſs. It appears from 1 *H. P. C.* 557. that a ſeparation of a ſhop from the manſion-houſe by leaſe is a ſufficient ſeparation in law to prevent the former from being the ſubject of burglary. Indeed in the *King* v. *Martha Jones*, 2 *Leach*, 607. *Ed.* 1800, where the rent of a houſe was paid from the partnerſhip fund of *A.* and *B.*, the property ſo as to conſtitute burglary was held to be ill laid in both, the houſe being in the ſingle occupation of *B.* Clearly in an ejectment brought for theſe premiſes the demiſe would not have been well laid in *M. R. Boulton*, and if ſo the property is not well laid to ſupport the offence of burglary. With reſpect to the 1ſt objection, the conſent of the proſecutor removes all criminality from the priſoners. In almoſt every ſpecies of offence committed againſt the property of another it is of the eſſence of the offence that it ſhould be committed againſt the will of the owner. *Bracton, lib.* 3. *tr.* 2. *c.* 32. *fo.* 150. *b.* defines theft thus, *contractatio rei alienæ fraudulenta cum animo furandi invito illo Domino cujus res illa fuerit*: and Lord Ch. J. *Willes*, in the *King* v. *Donally*, 1 *Leach*, 232. *Ed.* 1800, ſeems to take it for granted that robbery muſt be againſt the will of the owner, when he ſays, "Wherever one man obtains property from the poſſeſſion of another againſt his will, the law preſumes the act to proceed from a felonious intention." The proſecutor's aſſent to the commiſſion of the crime, would undoubtedly have made him an acceſſary before the fact, had it not been an aſſent to the ſtealing of his own property. In the *King* v. *M'Daniel*, *Foſt.* 125. it is laid down as incontrovertible, "that whoever procureth a felony to be done is a felon; if preſent he is a principal; if abſent an acceſſary before the fact;" and the ſtatutes, 4 and 5 *Ph.* and *M. c.* 4. and 3 and 4 *W.* and *M. c.* 9. are referred to; which, in deſcribing the offence,

ſpeak of perſons who "maliciouſly counſel, hire, command, comfort, aid, abet, or aſſiſt." Sir *Edward Coke* in his commentary on the ſtatute of *Weſtm.* 1. *c.* 14. 2 *Inſt.* 182. ſays, that under the word "aid" is comprehended all perſons "aſſenting and conſenting" to the act. Now in this caſe the proſecutor did aſſent and conſent, and if his crime be done away by the circumſtance of the property, to the ſtealing of which he aſſented, being his own, the ſame circumſtance does away the crime of the priſoners alſo; for if this was a felony, the proſecutor is criminal as an acceſſary, and he can only ſhew himſelf not criminal as ſuch by ſhewing that the priſoners committed no felony. Suppoſe *Phillips* the watchman had been indicted for the burglary, what could have prevented his being convicted of the crime but the aſſent of the proſecutor? Now that aſſent extends to all the perſons concerned, and will operate to ſave the priſoners in the ſame way as it would have operated in his favour. To ſhew that without ſuch aſſent *Phillips* muſt have been convicted, *Joſhua Cornwell's* caſe, 10 *Harg. St. Tr.* 433. in the notes, may be referred to, where the opening the door of his maſter's houſe by the priſoner in the night-time, and letting in two perſons to rob him, was adjudged by the twelve Judges to be burglary. In the *King* v. *M'Daniel*, all the priſoners were acquitted on account of the robbery having been committed in conſequence of a previous agreement, and it is there ſaid to be "of the eſſence of robbery and larceny that the goods be taken againſt the will of the owner." The only caſe in which the aſſent of the party robbed has been held not to take away the felony is that of *Norden*, cited in the judgment in the *King* v. *M'Daniel*, *Foſt.* 129; but the anſwer to that caſe is there given, *viz.* that it was uncertain whether the robber would come or not, the officer having no concert with the highwayman, but only going upon the road in expectation of being robbed, and ſubmitting to the robbery. In this caſe there was a regular plan for the robbery of the proſecutor's premiſes carried on through the intervention of the accomplice with the proſecutor himſelf.

Manley on the part of the proſecution. 1ſt, With reſpect to the burglary, it is not neceſſary that a communication ſhould exiſt between the part broken into and the reſt of the houſe; it is ſufficient if the former be parcel of the latter and under the ſame roof; this point ſeems clearly eſtabliſhed by the caſe of the *King* v. *Gibſon*, *Mutton*, and *Wiggs*. Nor is it any objection that the place where the offence was committed was uſed in the buſineſs of ſeveral other perſons jointly with *M. R. Boulton*, for being under the ſame roof with his dwelling-houſe it may well be conſidered as parcel of that houſe. If one of the partners in a banking-houſe occupy the dwelling-houſe to which the ſhop belongs, and the ſhop be broken into, there can be little doubt that it would amount to a burglary in the dwelling-houſe of the partner reſiding there. The caſe of the *King* v. *Martha Jones* is diſtinguiſhable from the preſent, it being expreſsly ſtated there that the two houſes were perfectly diſtinct and ſeparate from each other at the time the offence was committed. 2dly, It has been argued, that if the offence of the priſoners amount to a felony the proſecutor has made himſelf an acceſſary to that felony by his conduct, and that if he be not an acceſſary it muſt be becauſe no felony was committed. But the eſſence of the felony conſiſts in the felonious intent. Thus *Bracton* in the place cited on the other ſide, after ſaying that theft muſt be committed *cum animo furandi*, adds, *cum animo dico, quia ſine animo furandi non committitur*. The proſecutor therefore was not *particeps criminis*, inaſmuch as his conſent was only given for the purpoſe of promoting the detection of the priſoners. The preſent reſembles *Nordon*'s caſe, who went out with a view to be robbed in order that he might apprehend the robber. But in neither caſe was there any concert between the party committing the offence and the party on whom it was committed. Such alſo was the caſe of the man tried ſome little time back at *Worceſter* Aſſizes, who being ſuſpected of robbing in an inn there, a great coat was placed in his way with a pocket handkerchief hanging out of the pocket, and the man being watched and detected in ſtealing the handkerchief, was convicted before Mr. Baron *Thompſon*, who overruled the objection that he was induced to commit the offence by the perſons who placed the great-coat in his way. There is alſo a caſe in *Fitzherbert*'s Juſtice of the Peace, by *Crompton*, *Ed.* 1617. *p.* 31. *b.* which is preciſely in point. There the ſervant of an Alderman of *London* agreed with ſtrangers to ſteal the plate of his maſter on a certain night in his houſe, and they had a falſe key of the place where the plate was kept; afterwards the ſervant revealed the deſign to his maſter, who on the appointed night had certain men ready at the place, *et apres ils vient et enter in le dit lieu*, with intent to ſteal the plate, and were taken and arraigned for burglary at *Newgate*, found guilty and hanged.

1801.
The King v. Eggington and Others.

The opinion of the Judges was never publicly communicated, though it was underſtood to be in favour of the priſoners on the queſtion of burglary. The other objection taken by their counſel was overruled, as appeared from the priſoners receiving a pardon on condition of tranſportation beyond ſeas. Indeed *William Foulds*, who had been included in the indictment found againſt his aſſociates, having been taken between the Spring and Summer Aſſizes, was tried before Mr. Juſtice *Lawrence* at *Stafford* at the latter period, and being found guilty of the larceny received a ſimilar puniſhment with the other priſoners.

THE END OF TRINITY TERM.

CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the Forty-ſecond Year of the Reign of GEORGE III.

1801.

FAWCETT *v.* CHRISTIE and Another.

Nov. 6th.

THE Defendant in this caſe was arreſted in *Auguſt* laſt upon a *capias* returnable on the morrow of All Souls (3d of *November*); on the 2d of *November* he took out a ſummons and ſerved it on the Plaintiff to ſtay proceedings on payment of the debt and coſts; on the 3d, being the eſſoign day of the term, the Plaintiff filed a declaration *de bene eſſe*; on the 4th, the Defendant obtained an order to ſtay proceedings, and ſerved the Plaintiff with an appointment to attend the taxation of coſts upon the following day. On this laſt day (the 5th) the coſts were taxed by the prothonotary, who allowed the coſts of the declaration.

Beſt Serjt. now moved that the prothonotary might be directed to review his taxation, contending that the Plaintiff was not entit-

Defendant having been arreſted on a *capias* returnable on the firſt return of the term, on the day before the eſſoign day took out a ſummons to ſtay proceedings upon payment of the debt and coſts; on the eſſoign day Plaintiff filed a declaration *de bene eſſe*, and on the day after the eſſoign day, Defendant obtained an order to ſtay proceedings. Held that the Plaintiff was entitled to the coſts of the declaration.

1801.

Fawcett *v.* Christie and Another.

led to the coſts of a declaration filed after a ſummons to ſtay proceedings on payment of the debt and coſts, the ſummons being ſerved before the return of the writ. He cited *Golding* v. *Grace*, 2 *Bl.* 749. as in point; where the Court held, that, though a declaration may be delivered *de bene eſſe* on the return day, and ſhall be good for many purpoſes, yet being in favour of the Plaintiff to expedite his cauſe, it cannot be delivered ſo as to charge the Defendant with paying for the declaration till the appearance day (*a*).

But *The Court* were of opinion that the Plaintiff was entitled to the coſts of his declaration, ſaying that the ſummons was no ſtay of proceedings, and that he had therefore a right to proceed until an order was made; that if it were otherwiſe the Defendant might make uſe of a ſummons for the mere purpoſe of gaining time; that he might lie by, as in the preſent caſe, till the eve of the eſſoign day, take out a ſummons to prevent the Plaintiff's declaring, and then abandon the ſummons.

Beſt took nothing by his motion.

(*a*) The Court there obſerved, that if it were otherwiſe, "an attorney might delay the ſervice of the writ till the night before the return, and charge the Defendant with the coſts of the declaration as well as of the proceſs." And it is ſaid, that "in the *King's Bench* the maſter will not allow the coſts of declaration delivered under ſuch unfair circumſtances," 1 *Sell. Pr.* 227. *Ed.* 2. But no authority of that Court is cited in ſupport of this practice.

Nov. 9th.

Clempson *v.* Knox.

If bail be put in with the filazer of the county in which the Defendant is arreſted on a *teſtatum capias*, the bail may be treated as a nullity, and an attachment iſſue. But if the Plaintiff appear to have been aware that bail were actually put in, though with the wrong filazer, the Court will relieve againſt the attachment.

The Plaintiff in this caſe having ſued out a *capias* into *Middleſex*, upon which *non eſt inventus* was returned, afterwards ſued out a *teſtatum capias* into *Staffordſhire*, in which laſt county the Defendant was arreſted, and put in bail with the filazer for that county; this bail the Plaintiff treated as a nullity, and iſſued an attachment againſt the Sheriff of *Staffordſhire*.

A rule *niſi* having been obtained for ſetting aſide this attachment and all proceedings thereon, *Bayley* Serjt. now ſupported (*a*) the rule, and contended that the bail was regularly put in with the filazer for *Staffordſhire*, for that the rule of this Court, *Hil. T.* 1782, which allowed the Plaintiff to arreſt the Defendant in the county where he is to be found, and afterwards to declare againſt him in a different county without waving the bail, had taken away the writ of *teſtatum capias*, *Imp. Pr. C. B.* 160. *Ed.* 4. and that the writ upon which the Defendant was actually arreſted and put in bail was to be conſidered in the nature of an original *capias*.

Beſt Serjt. *contra*, inſiſted that the rule of this Court, *Hil. T.* 1781, *Imp. Pr. C. B.* 159, *Ed.* 4. had removed the only difficulty in caſes of this kind, by obliging the Sheriffs to ſpecify on their warrants for the *teſtatum capias* from what county the original *capias* iſſued, ſo that a Defendant can now be under no difficulty in aſcertaining the county where bail are to be put in; and that the rule of *Hil. T.* 1782 did not apply to this caſe, for though the Plaintiff by that rule be allowed to ſue out an original *capias* into a different county from that in which he means to declare, yet if he firſt ſue out an original *capias* and follow it up by a *teſtatum capias*, the bail muſt be put in as if that rule had not been made. He cited *Harris* v. *Calvert*, 1 *Eaſt.* 603. where a *capias* having iſſued into *London*, and the Defendant afterwards having been arreſted on an *alias capias* in *Middleſex*, and bail having been put in in the latter county, the Court of *King's Bench* ſet aſide the proceedings upon a *ſcire facias* againſt the bail, ſaying it was the ſame as if no bail had been put in, and the Plaintiff might have proceeded againſt the Sheriff for that default. He alſo obſerved that the objection was ſtronger in the *Common Pleas* than in the *King's Bench*, becauſe in the latter there is but one filazer for all *England*, whereas in the former there are different filazers for the different counties.

Bayley obſerved, that *Harris* v. *Calvert* did not apply, becauſe no rule exiſted in the *King's Bench* ſimilar to that in the *Common Pleas* of *Hil. T.* 1782.

The Court thought the attachment regular, obſerving however that they did not proceed upon the authority of the caſe in the

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(*a*) Previous to ſhewing cauſe a preliminary objection was taken to the affidavit on which the rule was founded, *viz.* that it was intitled in the cauſe, whereas it ought to have been intitled the *King* v. *The Sheriff of Staffordſhire.* The Court held the object on well founded; but it was afterwards waved.

1801.
CLEMPSON
v.
KNOX.

King's Bench, but upon the practice of this Court, and adding that the comment in *Impey's* Practice, which lays down that the rule of *Hil. T.* 1782 has taken away the *teſtatum capias*, is rather inaccurate. But it appearing that the Plaintiff at the time when he proceeded was aware of the bail having been actually put in with the filazer for *Staffordſhire*, they made the rule abſolute for ſetting aſide the proceedings, leaving the attachment to ſtand as a ſecurity.

(In the EXCHEQUER CHAMBER.)

Nov. 13th.

G. BROWN, H. BROWN, and J. P. RICHARD *v.* KEWLEY and Another; in Error.

Aſſumpſit for goods ſold and delivered. Plaintiff proved that having ſold goods to the Defendant, he received from him a check upon a *J. S.* a banker, directing the latter two months after date to pay to the Plaintiff a bill at two months, for the amount of the goods, which check was indorſed by the Plaintiff, and paid by him into the banking-houſe of *J. S.* who entered it ſhort in the Plaintiff's account; that the Plaintiff and Defendant both kept accounts with *J. S.*, and that the general courſe of buſineſs between *J. S.* and moſt of his cuſtomers was to ſettle accounts on certain quarterly days; when he advanced bills for his cuſtomers, or received bills from them, he entered the whole amount in his books as bills; but on the quarterly days he debited his cuſtomers witn the whole amount of bills advanced to or for them, crediting them at the ſame time for intereſt from ſuch day to the day when the bills would become due, and credited his cuſtomers for the whole amount of bills paid in by them, debiting them for the intereſt in like manner, and when a check was paid in for a bill to be drawn at a future day, he calculated and allowed intereſt, on the next quarterly day, to the time when ſuch bill, if drawn, would become payable; that the account of the Plaintiff and *J. S.* had been ſettled only ſix times between *May* 1798 and *March* 1793, but that each of thoſe ſettlements took place on a quarterly day; that on the 18th of *March* 1793, *J. S.* became bankrupt, a quarterly day having intervened between the payment of the check into the houſe of *J. S.* and his bankruptcy, upon which laſt quarterly day no ſettlement of accounts between Plaintiff and *J. S.* took place, nor was the amount of the check ever carried out as caſh, or any calculation of intereſt made thereon till after the bankruptcy; that when the check was paid into the banking-houſe of *J. S.* there was a balance of 51*l.* 11*s.* in favour of the Plaintiff, which was much overdrawn before the bankruptcy of *J. S.* without any other addition to the credit ſide of the Plaintiff's account than the check in queſtion. The Defendant offered to prove, that on the laſt mentioned quarterly day the account between himſelf and *J. S.* was ſettled, at which time he was debited for the whole amount of the check, and credited for intereſt thereon from the day of ſettlement to the day when the bill mentioned in the check, if drawn, would have become due. Held 1ſt, that the check in queſtion did not, under all the circumſtances of the caſe, amount to a payment for the goods by the Defendant; 2dly, that the evidence offered by Defendant was not admiſſible.

THIS was an action for goods ſold and delivered: and was tried before *Heath* J. and a ſpecial Jury at the *Lancaſter* Spring Aſſizes 1795. The learned Judge having rejected the evidence offered by the Defendants below (the Plaintiffs in error), and directed the Jury to find a verdict for the Plaintiffs below (the Defendants in error), a bill of exceptions was tendered, from which when annexed to the record in this Court, the caſe appeared to be in ſubſtance as follows. The evidence of the Plaintiffs below was to the following effect: that on the 19th of *January* 1793 *Kewley* and Co. who were merchants at *Liverpool*, by Meſſrs. *Greeves* and *Denniſon* their brokers ſold and delivered to *G.* and *H. Brown*, who were alſo merchants at *Liverpool*, 42 hogſheads of coffee, at the price of 1761*l.* 17*s.* 10*d.* to be paid for in two months by bills at two months' date; that this coffee was purchaſed by *G.* and

1801.
Brown and Others *v.* Kewley and Another; in Error.

H. Brown on the joint account of themſelves and *J. P. Richard*, alſo a merchant at *Liverpool;* that on the 7th of *February* 1793, *G.* and *H. Brown*, on behalf of themſelves and *J. P. Richard*, delivered to *Kewley* and Co. the following check on *Caldwell* and Co. bankers at *Liverpool:*

"Meſſrs. *Caldwell* and Co. *Liverpool*, 7th *February* 1793.

"Two months after date pay Meſſrs. *J.* and *P. Kewley* a bill at two months for one thouſand one hundred and ſixty-one pounds ſeventeen ſhillings and ten pence, charging one half to account of Meſſrs. *Richard* and Co.

£.1761 17*s.* 10*d.* *G. Brown* and *H. Brown.*"

That *G.* and *H. Brown* on their partnerſhip account, and *J. P. Richard* on his own account, and *Kewley* and Co. on their partnerſhip account, reſpectively dealt with *Caldwell* and Co. as bankers, and in the remitting and negotiating of money and bills of exchange; that on the 19th of *February* 1793 the above check was indorſed by *Kewley* and Co. and paid by them to *Caldwell* and Co. to be placed to their account, and was accordingly entered ſhort by *Caldwell* and Co. in their account with *Kewley* and Co. and alſo in the duplicate account kept by *Kewley* and Co.; that on the 18th of *March* 1793, *Caldwell* and Co. became bankrupts; that before the bankruptcy of *Caldwell* and Co. the general uſage and courſe of dealing between them and moſt of their cuſtomers was to ſettle their accounts quarterly, *viz.* on the 28th of *February*, the 31ſt of *May*, the 31ſt of *Auguſt*, and the 30th of *November*. 'When *Caldwell* and Co. advanced bills for their cuſtomers, or received bills from them, they always entered the whole amount of ſuch bills in their banking books as bills, but on the ſettlement of accounts they drew out an intereſt account, and made ſuch perſons debtors for the intereſt of all bills paid by the ſaid *Caldwell* and Co. to or for ſuch perſons from the time when ſuch bills became due until the next day of ſettlement, and on the contrary they gave ſuch perſons credit for the intereſt of bills which they had paid into the ſaid bank from the times when ſuch bills reſpectively became due until the day on which ſuch ſettlement took place (*a*), and the ba-

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(*a*) It is manifeſt that ſome error muſt have crept into this part of the bill of exceptions. From the latter part of the bill, as well as from the whole courſe of the argument, the uſage appears to have been this, *viz.* To debit the cuſtomers on each quarterly day for the whole amount of the bills advanced to or for them, and at the ſame time to credit them for the intereſt on ſuch bills from ſuch quarterly day to the day when they would reſpectively become due; and on the other hand, to credit the cuſtomers on the quarterly day with the whole amount of bills paid in by them, and to debit them with the intereſt from ſuch day to the day when the bills would reſpectively become due.

lance of ſuch intereſt account was on ſuch ſettlement charged to the debit or credit of the perſons with whom the ſaid *Caldwell* and Co. kept accounts, according to the ſtate of ſuch intereſt account, and on ſuch ſettlement the intereſt to debit or credit made a component part of the principal ſum which was carried on as a freſh balance; and ſo they from time to time carried on ſuch account. The intereſt when to the debit of the cuſtomer was entered at the time of ſettlement thus—" Intereſt to debit deducted £. —;" and the amount was deducted from the credit ſide of the account: the intereſt when to the credit of the cuſtomer was entered thus—" Intereſt to credit £. —;" and the amount was added to the credit ſide of the account. And when any checks or orders were given for bills, which bills were to be drawn at a future period after the date of the check or order, and ſuch check or order was paid into the bank, the intereſt was at the next day of ſettlement in like manner calculated and allowed from the time when ſuch bill, if it had been drawn, would by the tenor of the check or order have become payable;' that *Kewley* and Co. began to deal with *Caldwell* and Co. on the 1ſt *May* 1788, and the accounts between them were ſettled at the reſpective times following, *viz.* on the 31ſt of *Auguſt* 1788, the 30th *November* 1789, the 28th *February* 1790, the 31ſt of *Auguſt* 1790, the 28th *February* 1791, and the 31ſt *May* 1792; that when the ſaid check was paid in by *Kewley* and Co. and entered in the book of *Caldwell* and Co. the whole account from the laſt-mentioned ſettling day on the credit ſide in favour of *Kewley* and Co. was as follows, *viz.*

By balance 31ſt *May* 1792 - -				322	0	11
Oct. 13. *Greaves* and Co.—16. *Dec.* -				123	11	9
Feb. 9. order *G. B.* and *H.* and *R. M.* and Co.—10. *June* - -	1761	17	10			
				445	12	8

That the letters " *G. B.* and *H.*" expreſſed that *G.* and *H. Brown* were the drawers of the check, and the letters " *R. M.* and Co." that half the amount of the check was to be placed to the account of *J.* and *P. Richard*, and that " 10. *June*" expreſſed the time when the bill required by the check was to become due; that after this entry, but before the bankruptcy, the ſums in the caſh column of the above account were added up by one of the partners in the bank, which amounted to 445*l.* 12*s.* 8*d.* without including the

1761*l.*

1801.

Brown and Others v. Kewley and Another; in Error.

1761*l.* 17*s.* 10*d.*; which ſtill remained entered ſhort, and ſo remained at the time of the bankruptcy; that after the bankruptcy one of the clerks carried out the ſaid 1761*l.* 17*s.* 10*d.* into the caſh column, and eraſed the ſum 445*l.* 12*s.* 8*d.* inſtead of which he inſerted the whole amount of the ſums contained on the credit ſide of the ſaid account, including the ſaid ſum of 1761*l.* 17*s.* 10*d.*; that no calculation of intereſt on the ſaid 1761*l.* 17*s.* 10*d.* was ever made or inſerted in the book containing the account of intereſt between *Kewley* and Co. and *Caldwell* and Co. before the bankruptcy of the latter, the clerk who uſually tranſacted that part of the buſineſs having been forbidden to inſert ſuch charge by one of the partners in the houſe of *Caldwell* and Co. till he ſhould have ſeen one of the partners in the houſe of *Kewley* and Co.; but in the books of *Caldwell* and Co. when produced, the whole account of *Kewley* and Co. appeared to have been balanced, and intereſt to have been charged on the bill for 1761*l.* 17*s.* 10*d.* which balance was ſettled by one of the clerks in the houſe after the bankruptcy; that at the time when *Kewley* and Co. paid in the bill for 1761*l.* 17*s.* 10*d.* to the banking-houſe of *Caldwell* and Co., the balance of accounts in their favour amounted to no more than 51*l.* 11*s.* but after that payment, and before the bankruptcy of *Caldwell* and Co. they received from *Caldwell* and Co. (without any freſh advance on their part), in caſh and bills which were afterwards paid 294*l.* 3*s.* 5*d.*, and ſeveral other bills to the amount of 856*l.* 12*s.* 11*d.* which were not paid in conſequence of the bankruptcy of *Caldwell* and Co., but returned and taken up by *Kewley* and Co., and that no bill was ever paid or required to be paid by *Caldwell* and Co. for the amount of the check of the 7th *February*.

On the other hand *Brown* and Co. in order to prove that the check given by them to *Kewley* and Co. was paid to and received by *Caldwell* and Co. upon the terms and in the uſual courſe of buſineſs above mentioned, notwithſtanding the intereſt on the 1761*l.* 17*s.* 10*d.* was not entered in the account of *Kewley* and Co. to their debit till after the bankruptcy, offered evidence that in the reſpective accounts between *Caldwell* and Co. and *G.* and *H. Brown*, and *Caldwell* and Co. and *J. P. Richard*, one moiety of the amount of the check in queſtion was entered to the debit of *G.* and *H. Brown*, and the other moiety to the debit of *J. P. Richard*; that on the 28th of *February* 1793, which was the next ſettling day after the delivery of the check by *Kewley* and Co. to

Caldwell and Co., *G.* and *H. Brown* and *J. P. Richard* were according to the uſage above-mentioned credited in their reſpective accounts with the intereſt of their reſpective moieties from the laſt mentioned ſettling day for ſo many days as the bill required by the check to be paid would have to run before it would become due.

This evidence being objected to by the counſel for *Kewley* and Co. as inadmiſſible, was rejected by the learned Judge: upon which the counſel for *Brown* and Co. inſiſted that the delivery of the check to *Kewley* and Co. and their receipt of the ſame in payment of the goods, and the indorſement over of the check to *Caldwell* and Co. operated as a legal payment and ſatisfaction for the goods, but the learned Judge directed the jury that it was not a legal payment or ſatisfaction, and that the evidence given on the part of *Kewley* and Co. if believed, entitled them to a verdict. Whereupon a bill of exceptions was tendered, and afterwards ſealed by the learned Judge.

The aſſignment of errors proceeded upon the rejection of the evidence tendered on the part of *Brown* and Co., and the direction given to the jury.

Giles for the Plaintiffs in error on a former day argued, 1ſt, That if the books of *Caldwell* and Co. were admiſſible in evidence on the part of *Kewley* and Co. to ſhew how the account ſtood between them and *Caldwell* and Co., they were admiſſible alſo on the part of the *Browns*, to ſhew how their account ſtood with *Caldwell* and Co., for that the act of the bankers, if available againſt one party, was available alſo againſt the other: 2dly, that the whole difficulty of the caſe had ariſen from the neglect of *Kewley* and Co. to ſettle their account upon the 28th of *February*, for had they ſo done they would then have been credited for the whole amount of the check *minus* the intereſt from that time to the 10th of *June*, which would clearly have been a ſatisfaction for the goods; that although *Kewley* and Co. had not regularly ſettled their account on all the quarterly days from the time of their beginning buſineſs with *Caldwell* and Co. yet it appeared from the evidence that the days on which they had ſettled their accounts were all quarterly days, and therefore they muſt be conſidered as being within the uſage; that if ſuch was the caſe, *Kewley* and Co. muſt be treated as if they had actually ſettled their accounts on the 28th of *February*; that although no balance was actually ſtruck, yet that *Kewley* and Co. had obtained credit and derived advantage from

1801.

Brown and Others *v.* Kewley and Another; in Error.

from the check having been paid in to *Caldwell* and Co. for that they had drawn beyond the amount of their account as it ſtood when the check was paid in, without having increaſed their credit by any additional bills or caſh.

Lambe for the Defendants in error contended, 1ſt, That the manner in which *Caldwell* and Co. kept their accounts with *Brown* and Co. could not control a contract made between the latter and *Kewley* and Co., it being a general principle that whatever paſſes between two perſons cannot bind a third who is no party to the tranſaction; 2dly, that it did not appear that *Kewley* and Co. ever acceded to the uſage ſtated in the bill of exceptions, only ſix ſettlements of account between them and *Caldwell* and Co. having taken place from *May* 1788 to the period of the bankruptcy; that in fact the uſage was only ſtated to extend to *moſt* of the cuſtomers, and that *Kewley* and Co. therefore were not under the neceſſity of negativing their having acceded to the uſage; that no bill was in fact demandable till the 7th of *April*, before which time *Caldwell* and Co. had become bankrupts, and were unable to give any bill, and therefore it reſembled the caſe of a bill diſhonoured, which is no payment; that at any rate the check being entered ſhort up to the time of the bankruptcy, proved deciſively that it was never conſidered as caſh in the account between *Caldwell* and Co. and *Kewley* and Co., for that according to the caſe of *Zinck* v. *Walker*, 2 *Bl.* 1154. it was a mere depoſit, and the property remained unaltered; and that it did not appear that the money advanced to *Kewley* and Co. was on the faith of the check in queſtion, but might have been advanced on the general confidence ſubſiſting between the two parties.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord Alvanley Ch. J. (who after ſtating the principal facts of the caſe, proceeded thus). It would have been very material in this caſe for *Brown* and Co. to have ſhewn that a ſettlement had actually taken place between *Kewley* and Co. and *Caldwell* and Co. after the bill was paid in, and previous to the bankruptcy of the latter, whereby that which was in its inception merely a bill tranſaction, would have been converted by the act of both parties into a money tranſaction. It happens however that the contrary fact has been eſtabliſhed, *viz.* that the laſt ſettlement between *Kewley* and Co. and *Caldwell* and Co. took place on the 31ſt of

May 1792, a period of nearly a year antecedent to the time at which the bill of *Brown* and Co. was paid into the banking-houſe. Now it is moſt clear that *Kewley* and Co. cannot be bound by any ſettlement of accounts between themſelves and *Caldwell* and Co., to which they did not agree. Indeed in this caſe the bill in queſtion continued in that column of the account where bills are entered ſhort until after the bankruptcy of *Caldwell* and Co., after which period any alteration in the account would of courſe be perfectly ineffectual. Up to that time therefore it ſtood as a running bill, and was never accepted by *Kewley* and Co. as payment of their debt from *Brown* and Co., nor to their knowledge ever conſidered by any one elſe as payment of that debt. It is ſtated indeed, that after the bill had been paid into the banking-houſe, *Kewley* and Co. overdrew their account as it ſtood before it was paid in, and were accommodated by *Caldwell* and Co. with bills inſtead of money, which bills on the failure of the latter were not paid. But this accommodation does not by any means appear to have proceeded on the ground of the bill in queſtion being paid in, but the only inference to be collected from that circumſtance is, that theſe bankers who were in the habit of accommodating their cuſtomers to a conſiderable extent, permitted *Kewley* and Co. to overdraw their account. Nor indeed if that permiſſion reſulted from the circumſtance of the bill being paid in, would it conſtitute a payment between *Kewley* and Co. and *Brown* and Co. for the goods ſold by the former to the latter. The 1ſt queſtion to be conſidered is, whether this tranſaction can be deemed a payment accepted by *Kewley* and Co., and in conſidering that point it will be neceſſary to inquire, whether *Kewley* and Co. could have maintained an action againſt *Caldwell* and Co. for the amount of the bill? Now I think it very clear that no ſuch action could have been ſuſtained, for till *Caldwell* and Co. actually credited *Kewley* and Co. in their books for the amount of the bill as money received by them, there would exiſt no evidence to charge them with ſuch a demand; and indeed it is admitted on all ſides that while the bill remained entered ſhort, nothing but an aſſent of the reſpective parties could bind either to accept the bill as a payment of money. If therefore *Caldwell* and Co. were not liable to any demand from *Kewley* and Co. for the amount of the bill, it will be impoſſible to work up this tranſaction into a payment as between *Kewley* and Co. and *Brown* and Co. The next queſtion that

1801.

Brown and Others *v.* Kewley and Another; in Error.

that ariſes is, whether the evidence rejected by the learned Judge was properly rejected? That perhaps is the moſt doubtful queſtion of the two. Clearly, if when admitted, the evidence would have proved nothing, it was not admiſſible. It was aſked, why ſhould not this ſort of evidence be admitted on the part of *Brown* and Co. in the ſame manner as it was admitted on the part of *Kewley* and Co.? For this plain reaſon, that the evidence admitted on the part of *Kewley* and Co. was an eſſential part of the tranſaction, and aroſe as much out of the caſe on one ſide as the other. It does not therefore follow that evidence of the ſame ſort not introduced by the ſame neceſſity was admiſſible. *Kewley* and Co. were bound to ſhew what had become of the bill given to them by *Brown* and Co. for the goods. It is true that a day of ſettlement between *Brown* and Co. and *Caldwell* and Co. had arrived, and that the former had agreed to be accounted debtors to the latter for the amount of the bill. But *Kewley* and Co. were not informed that they had acquired this new credit in the books of *Caldwell* and Co., and the latter, if called upon in conſequence of this agreement between them and *Brown* and Co. to pay the amount of the bill to *Kewley* and Co. might have anſwered, it is true that we have admitted *Brown* and Co. to be our debtors for the amount of the bill, but what uſe can you a third party make of that agreement between us? I think it clear that *Caldwell* and Co. could not have been charged by *Kewley* and Co. in conſequence of any thing that paſſed between the former and *Brown* and Co., and that the debt between *Brown* and Co. and *Kewley* and Co. remained no further diſcharged than all debts are for which a bill not due is given in payment. We think therefore that the learned Judge was right in rejecting the evidence offered by *Brown* and Co., 1ſt, becauſe evidence of what paſſed between themſelves and *Caldwell* and Co. without the privity of *Kewley* and Co. could not bind the latter; and, 2dly, becauſe if admitted it would have been of no avail. On the 1ſt point I have already ſaid we are of opinion that the check was never accepted by *Kewley* and Co. in payment of their debt, and conſequently that *Brown* and Co. at the time this action was brought remained debtors to them for the value of the goods.

Per Curiam, Judgment affirmed.

Nov. 16th.

Harris *v.* Manley.

An indorſer of a bill of exchange may be bail for the drawer in an action againſt him upon the ſame bill.

An indorſer upon a bill of exchange was brought up to juſtify as bail in an action againſt the drawer of the ſame bill.

Beſt Serjt. objected that he ought not to be admitted, inaſmuch as the Plaintiff's ſecurity would not be increaſed by the recognizance of the indorſer, who was already liable to the Plaintiff upon the bill.

Onſlow Serjt. on the other ſide ſtated that a ſimilar objection had been taken to a perſon who came up to juſtify as bail in the *King's Bench* in an action againſt the *Portland-Place* Bank, and had been overruled.

The Court (*abſente* Lord *Alvanley* Ch. J.) thought the objection of no weight, and accordingly

Admitted the bail.

Nov. 19th.

Grigby *v.* Oakes and Another.

Bank notes are not made a legal tender by the 37 *Geo.* 3. *c.* 45.

This was an action on a promiſſory note; the Defendants as to all but five guineas pleaded *non aſſumpſerunt*, and as to the remaining five guineas they pleaded a tender. The cauſe came on to be tried at the Summer Aſſizes for *Suffolk*, before Mr. Baron *Hotham*, when a verdict was found for the Plaintiff, with one ſhilling damages, ſubject to the opinion of the Court upon the following caſe.

"The Defendants are bankers at *Bury St. Edmunds*, and iſſued the note in queſtion for five guineas, payable on demand to the bearer. On the 31ſt *January* laſt the Plaintiff carried ſeveral notes to the ſhop of the Defendant and demanded payment. He firſt preſented other notes, to the amount of 50 guineas, for which he received payment, partly in Bank of *England* notes and partly in caſh, the caſh being ten pounds, and being the proportion of money they uſually pay. He then preſented the note in queſtion, for which the Defendants tendered in payment a 5 *l.* Bank of *England* note and five ſhillings in ſilver. This the Plaintiff refuſed on the ground that the tender was partly in a Bank of *England* note, objecting to ſuch note, and inſiſted on being paid wholly in money. The Defendants refuſed to pay wholly in money. The Plaintiff did not at the time ſay he wanted money for his own particular accommodation, but ſtated that he came on purpoſe to have caſh for the note, or to bring an action if payment in money was refuſed.

The queſtion for the opinion of the Court was, Whether, under the circumſtances before ſtated, the Plaintiff was entitled to recover?

Shepherd Serjt. for the Defendants argued, that though unqueſtionably previous to the paſſing of the 37. *Geo.* 3. *c.* 45. commonly called the Bank Act, a bank note would not have been a legal tender, yet that ſince the paſſing of the above act ſuch notes muſt be conſidered as caſh, for that the neceſſary conſequence of the above act being to abſorb a vaſt proportion of the actual caſh of the country, the Legiſlature muſt have intended to give a new character to bank notes by way of ſubſtitute; that they had ſpecifically declared them to be a good tender ſo as to prevent an arreſt, and yet if the ſame ſpirit which actuated the preſent Plaintiff in the commencement of this action was to continue to influence his conduct, and that of others alſo, a Defendant, though exempted from arreſt, might ultimately be taken in execution though ready to pay in bank notes, ſince he might poſſibly be unable to ſatisfy the judgment obtained againſt him altogether in money; becauſe even if a ſale of his goods took place, the ſheriff might not be able to avoid receiving a large proportion of bank notes from the purchaſers; that indeed in ſome reſpects bank notes were privileged by the 37. *Geo.* 3. *c.* 45. beyond caſh, inaſmuch as a tender of them in ſatisfaction of a debt operated to diſcharge a party from arreſt, which was not the caſe with a tender of money, which muſt be pleaded in bar; and that no contrary inference could be drawn from the 8th ſection of the act, which declared payments in bank notes to be equivalent to payments in caſh, *if made and accepted as ſuch*, becauſe that muſt have been the caſe before the paſſing of the act, and therefore that clauſe muſt be deemed nugatory.

Sellon Serjt. *contrà* was ſtopped by the Court.

Lord ALVANLEY Ch. J. The queſtion for the Court to decide is a mere queſtion of law, ariſing, as it has been contended, out of the proviſions of the 37 *Geo.* 3. *c.* 45. In fact we are called upon to ſay, whether it follows as a neceſſary conſequence from that act that a tender in bank notes is equivalent to a tender in money? It may be very true that individuals may be occaſionally ſubjected to great inconveniencies from the operation of that act; but are we therefore to ſay that the Legiſlature has enacted that which the proviſions of the act do not warrant? If we were at liberty to refer to our own private knowledge of the language that was held in Parliament while this act was pending, no doubt could be entertained upon the ſubject. We know that it was very much canvaſſed by many perſons at that time, whether or not the Legiſlature ought to go the length of declaring bank notes a good legal tender? If therefore it had been intended by the Legiſlature ſo to make them, that intention would have been expreſſed in ſuch clear terms that no queſtion could have ariſen upon the ſubject. Indeed it is expreſsly provided in the 2d ſection of the act, that if the Governor and Company of the Bank of *England* ſhall be ſued on any of their notes, or for any ſum of money, payment of which in their notes the party ſuing refuſes to accept, they may apply to the Court in which ſuch proceedings are inſtituted to ſtay proceedings during ſuch time as they are reſtricted from paying in caſh. But with reſpect to individuals it was not intended to prevent any creditor who ſhould be ſo diſpoſed from captiouſly demanding a payment in money, though ſuch a creditor is deprived of the benefit of arreſting his debtor. Thank God few ſuch creditors as the preſent Plaintiff have been found ſince the paſſing of the act! But yet whatever inconveniencies may ariſe, and to whatever length they may go, Parliament and not this Court muſt be applied to for a remedy. Inconvenience ariſing from the operation of an act of Parliament can be no ground of argument in a Court of Law; and even if it were, ſtill I ſhould entertain no doubt that it was the intention of the Legiſlature to make bank notes a legal payment only in certain caſes by them expreſſed, and that in all other caſes they ſhould remain upon the ſame footing upon which they ſtood before the act, except as to the exemption from arreſt which they afford to the party tendering them in payment. The 8th ſection of the act, which has been treated as nugatory in the argument, however it may enact nothing new, ſtill appears to me pregnant with the intentions of Parliament, and to ſpeak loudly the reſolution not to alter the character of bank notes but in thoſe caſes which are ſpecially provided for. Without however referring to any of thoſe ſpecific clauſes, and arguing from them as to the intent of the Legiſlature, I ſhould be clearly of opinion that the preſent Plaintiff is entitled to our judgment in his favour.

HEATH J. I am of the ſame opinion. The queſtion for us to decide is, Whether a tender in bank notes is a good legal tender? Now the 37 *Geo.* 3. *c.* 45. appears to me to negative that queſtion; for the ſeveral proviſions of the act making them a good legal tender in certain excepted caſes excludes the idea of their being ſo generally in caſes not provided for by the act. It has been argued however that the operation of the act will in many caſes be very injurious, unleſs we determine it to be a neceſſary inference from the act that bank notes were intended by the Legiſlature to be put upon the ſame footing as caſh. But whatever inconveniences may ariſe, the Courts of Law cannot apply a remedy. I think indeed the Legiſlature acted wiſely, having the recent example of *France* before their eyes, to avoid making bank notes a legal tender; for in *France* we know that legiſlative proviſions of that kind in favour of paper currency only tended to depreciate the paper it was deſigned to protect, and were ultimately repealed as injurious in their nature.

ROOKE J. I am of the ſame opinion.

CHAMBRE J. This caſe appears to me almoſt too plain for argument. It has been thought that the Courts went a great way in holding a tender in bank notes to be a good tender, if not objected to at the time (*a*). Certainly that was an innovation; though perhaps a beneficial one. But the act upon which the preſent queſtion ariſes affords nothing but arguments againſt the inference attempted to be drawn from it. Surely the obſervation that in ſome reſpects the Legiſlature have put bank notes on a more favourable footing than caſh, leads to a concluſion directly contrary to that which it was intended to ſupport. If the Legiſlature have not gone far enough, it is for them, not for us to remedy the defect. Indeed, by making bank notes a good tender in certain caſes ſpecifically provided for, they appear to me to have negatived the conſtruction we are now deſired to put upon the act.

Poſtea to the Plaintiffs.

(*a*) See *Wright* v. *Reed*, 3 *Term Rep.* 554.

Nov. 19th.

HUNTLEY *v.* LUSCOMBE.

Service of a demand of a copy of the commitment on the turnkey of a priſon is not ſufficient to ſupport an action againſt the gaoler for the penalty incurred by him under the habeas corpus act, for not delivering the copy to the priſoner within due time after the demand made, if the gaoler himſelf were in the priſon. *Quære*, Whether a commitment in execution for a penalty on conviction before a magiſtrate for an offence againſt the Exciſe Laws, be a commitment for " a criminal matter," within the proviſions of the habeas corpus act, ſo as to entitle a priſoner to an action againſt the gaoler for not delivering a copy within a certain time after demand made?

THIS was an action on the caſe againſt the Defendant as keeper of the gaol at *Portſmouth* for not delivering to the Plaintiff, who ſtood committed and detained in his cuſtody, " under and by virtue of a certain warrant or certain warrants of commitment and detainer for a certain ſuppoſed criminal matter not being felony or treaſon," a true copy of the warrant of commitment.

The cauſe was tried before *Thompſon* Baron, at the laſt Spring Aſſizes at *Wincheſter*, when it appeared that the Defendant was in cuſtody under a warrant of commitment, granted by two Juſtices in conſequence of a return of *nulla bona* to a previous warrant of diſtreſs to levy a penalty of 20*l.* recovered againſt the Plaintiff for an offence againſt the exciſe laws. The warrant of commitment authoriſed the officers to whom it was directed " to take and arreſt the body of the ſaid *H. Huntley* (the Plaintiff), and forthwith to carry the ſame to the gaol or priſon of and for the borough or place where they ſhould take and arreſt the ſame, and the ſame, together with a duplicate of the warrant there to deliver into the cuſtody of the gaoler or keeper of the ſaid gaol or priſon of and for the ſaid borough or place, there to remain in ſafe cuſtody until ſhe ſhould ſatisfy and pay the ſum of 20*l.* by the ſaid Juſtices adjudged againſt her on an information exhibited againſt her by *J. P.* as well on behalf of his Majeſty as of himſelf for a certain offence committed by the ſaid *H. Huntley* againſt the laws and ſtatutes of exciſe, whereof ſhe ſtood convicted." At the trial it was proved that one of the perſons then in confinement in the priſon, on the part of the Plaintiff ſerved the turnkey on the 25th of *November* with a notice directed to the Defendant of a demand of a copy of the warrant, and that on the 27th the turnkey delivered to the Plaintiff a copy of the warrant indorſed by the Defendant; whereas by the 31 *Car.* 2. *c.* 2. *ſ.* 5. ſuch copy is required to be delivered within ſix hours after the demand. The Defendant was reſident in a houſe, the door of which opened into the priſon yard.

It was objected on behalf of the Defendant, in the early part of the trial, that the notice of a demand of a copy having only been

1801.

HUNTLEY *v.* LUSCOMBE.

ſerved on the turnkey, there was no evidence as to the time at which it came to the Defendant's hands. The learned Judge over-ruled the objection, but ſaid he would reſerve it for the Defendant's counſel, in caſe they ſhould be inclined to move the point. Afterwards it was objected that the commitment under which the Plaintiff had been detained being only for the non-payment of a penalty, was to be conſidered as a commitment in execution in a civil matter, in which caſe the 31 *Car.* 2. *c.* 2. *ſ.* 5. upon which the action was founded would not apply. Upon this point the learned Judge nonſuited the Plaintiff, with liberty to move that the nonſuit might be ſet aſide, if this Court ſhould be of a different opinion.

Accordingly a rule *Niſi* for that purpoſe having been obtained in the courſe of laſt *Eaſter* Term,

Lens Serjt. ſhewed cauſe in *Trinity* Term laſt. Two objections ariſe in this caſe, firſt that the offence for which the Plaintiff was committed was not a criminal or ſuppoſed criminal matter; and ſecondly, that he was committed in execution. The preamble of the 31 *Car.* 2. *c.* 2. recites that great delays had been uſed by ſheriffs *&c*, to whoſe cuſtody any of the King's ſubjects had been committed for criminal or ſuppoſed criminal matters, in making returns of writs of *habeas corpus* to them directed; and then proceeds to make ſeveral proviſions for the relief of the ſubject in that reſpect. Now one of the means offered to the party in cuſtody for procuring that eaſe which is the object of the ſtatute is the enabling him to demand a copy of the warrant under which he is committed, and puniſhing the gaoler who neglects to grant it within a given time. But not only the previous proviſions with reſpect to the granting a return of the *habeas corpus*, but alſo this mode of obtaining information of the offence for which the party is detained, have reference to the words in the preamble, "any of the King's ſubjects committed for criminal or ſuppoſed criminal matters." And the third ſection uſes the words "committed for any crime:" and the fifth ſection which authoriſes priſoners to demand a copy of the warrant, for the purpoſe of enabling them to obtain their *habeas corpus*, muſt certainly be confined to thoſe perſons who are entitled to an *habeas corpus* under the third ſection. Indeed, the Plaintiff in this declaration has alleged that he was committed for a ſuppoſed criminal matter; unleſs therefore that allegation be ſupported by the evidence, the Plaintiff muſt fail. But the commitment is only for non-payment of a penalty of 20*l.* incurred by a breach of the exciſe laws, which muſt be conſidered as a civil matter. All ſuits in the Exchequer for penalties of this nature, though in the name of the King, are conſidered as civil ſuits; for the Court of Exchequer is not a criminal court (*a*). There can be no doubt that if the 5th ſection is to be connected with the 3d ſection, this action cannot be maintained. For the 3d ſection expreſsly excepts from its proviſions "perſons convict or in execution by legal proceſs;" under which exception the preſent Plaintiff falls: and that the 3d and 5th ſections are to be connected appears evident, becauſe the former having directed the nature of the returns to writs of *habeas corpus*, the latter enacts, that if the officers neglect to make the returns *aforeſaid*, or bring the body or bodies "of *the* priſoner or priſoners," that is the priſoners provided for in the 3d ſection, they ſhall be puniſhed. So at the end of the 5th ſection the penalties are given to "the priſoner or party grieved;" that is, the priſoner or party againſt whom the officers have offended by omitting to comply with the directions of the 3d ſection.

Shepherd Serjt. in ſupport of the rule. The 5th ſection of the *habeas corpus* act extends not only to thoſe writs of *habeas corpus* which are given by that act, but to all other writs of *habeas corpus* at common law; now although a perſon in execution be not en-

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(*a*) *The Attorney General* v. *John Bowman.* Sittings at *Weſtminſter, coram Eyre* Ch. B. 16th *Jan.* 1791.

Upon the trial of an information againſt the Defendant for keeping falſe weights, and for offering to corrupt an officer, the Defendant's counſel called a witneſs to character. The evidence being objected to by the Court,

Plumer for the Defendant urged, that it was admiſſible as tending to ſhew that the Defendant was incapable of the crime imputed to him. He ſaid that ſuch evidence had been received on the *Oxford* Circuit in an action upon the ſtatute for cheating at play, imputing a general fraud; and that he believed it had alſo been received in a revenue proſecution in the Exchequer, either for forging or making uſe of a falſe ſtamp.

Newnham contrà inſiſted that ſuch evidence had never been received in any penal action, and that the information was not a criminal proceeding, for that Lord Chief Baron *Parker* had often ſaid that the Court of Exchequer had no criminal juriſdiction.

EYRE Ch. B. I cannot admit this evidence in a civil ſuit. The offence imputed by the information is not in the ſhape of a crime. It would be contrary to the true line of diſtinction to admit it, which is this; that in a direct proſecution for a crime, ſuch evidence is admiſſible, but where the proſecution is not directly for the crime but for the penalty, as in this information, it is not. If evidence to character were admiſſible in ſuch a caſe as this, it would be neceſſary to try character in every charge of fraud upon the Exciſe and Cuſtom-Houſe Laws. The Defendant may move the Court upon the ground of evidence having been rejected which ought to have been received, but I am of opinion that the evidence offered is not admiſſible.

titled to an *habeas corpus* under the new juriſdiction created by the 3d ſection of that act, yet he is clearly entitled to an *habeas corpus* at common law. But if the proviſions of the *habeas corpus* act are extended only to ſuch writs of *habeas corpus* as are granted under the directions of that act, all other writs of *habeas corpus* might in vain be iſſued by the courts, ſince the penalties impoſed by the act for diſobedience would not in ſuch caſes affect the officers to whom they were directed. Indeed it is clear from the act itſelf, that the 5th ſection was intended in ſome caſes to extend further than the 3d ſection; for the 2d ſection, which directs officers to make returns of writs of *habeas corpus* directed to them, extends to all commitments except thoſe in which treaſon or felony is plainly expreſſed in the warrant, and the 5th ſection impoſes a penalty upon officers neglecting or refuſing to make "the returns aforeſaid," which muſt extend to the returns mentioned in the 2d ſection. It may be obſerved that the 3d ſection ſeems to ſtand by itſelf; whereas the other parts of the act extend to all commitments except thoſe in which treaſon or felony is expreſſed in the warrant. No evil can well ariſe from the conſtruction contended for on the part of the Plaintiff, whereas great danger may enſue from a contrary conſtruction; for a priſoner who gets a copy of his commitment does not of courſe obtain his diſcharge, but only where he is committed improperly; whereas to hold that a priſoner in execution is not entitled to a copy of his commitment, will ſuggeſt an effectual mode of preventing every priſoner from obtaining his diſcharge from any commitment, however illegal, as for inſtance a commitment for ſix months, where the law only authoriſes a commitment for three months; becauſe if the commitment be but framed in the ſhape of a commitment in execution, the party committed not being able to procure a copy of his commitment will not be able to aſk for that relief to which he is entitled. With reſpect to the queſtion, whether the offence for which the Plaintiff was committed is to be conſidered as criminal matter, it ſeems clear from the nature of the proceeding that it muſt be ſo conſidered. The ſtatute of 35 *Geo.* 3. *c.* 113. *ſ.* 7. impoſes a penalty for the particular breach of the Exciſe Laws of which the preſent Plaintiff was guilty, and enacts that it may be recovered by action of debt or information. Now although it might have been contended, if the action of debt had been reſorted to, that the ſubject matter of the action muſt be conſidered to be

1801.
HUNTLEY
v.
LUSCOMBE.

be of a civil nature, yet as the penalty has been recovered by information before a Juſtice, it cannot be viewed in any other light than as a proceeding for a criminal matter. Giving a pecuniary penalty by way of puniſhment cannot alter the nature of the offence.

The Court deſired the caſe might ſtand over until this Term, ſaying it was of great importance, and they ſhould probably conſult the other Judges upon the point.

Early in this Term Lord *Alvanley* Ch. J. obſerved that the 1ſt objection taken at the trial, which appeared upon the learned Judge's report, had not been ſpoken to at all, and deſired there might be a further argument of the caſe upon that point.

Accordingly on this day *Williams* Serjt. on the part of the Defendant contended, that as this was an action to recover a penalty, the Plaintiff ſhould be ſtrictly held to ſhew that the Defendant had committed the offence on which the penalty attached; that as the notice of a demand was only ſerved on the turnkey, it did not appear that it ever came to the hands of the Defendant, and that it clearly appeared from the conduct of the Defendant that he had no intention to withhold a copy of the warrant, ſince he actually delivered one the next day but one after the demand made.

Beſt Serjt. *contrà*, inſiſted that the *habeas corpus* act was not to be conſidered as a penal ſtatute, but on the contrary a highly remedial law; that the proviſion in queſtion was framed in a different manner from all penal proviſions whatſoever, inaſmuch as the Legiſlature in caſe of the death of the offending party had given a right of action againſt his executors and adminiſtrators; that the title of the ſtatute demonſtrated the intention of the Legiſlature to make it a remedial law, it being intitled "An act for the better ſecuring the liberty of the ſubject, and for prevention of impriſonments beyond the ſeas;" and that it therefore required the moſt liberal conſtruction. He cited the words of the 5th ſection of the act, "that if any officer or officers, his or their under-officer or officers, under-keeper or under-keepers, or deputy, ſhall neglect or refuſe to make the returns aforeſaid (*viz.* the returns to writs of *habeas corpus*), or to bring the body or bodies of the priſoner or priſoners, according to the command of the ſaid writ, within the times aforeſaid, or upon demand made by the priſoner or perſon in his behalf, ſhall refuſe to deliver, or within the ſpace of ſix hours after demand ſhall not deliver to the perſon ſo demanding a true copy of the warrant or warrants of commitment and detainer of ſuch priſoner, which he and they are hereby required to deliver accordingly, all and every the head gaolers and keepers of ſuch priſons and ſuch other perſon in whoſe cuſtody the priſoner ſhall be detained, ſhall for the 1ſt offence forfeit to the priſoner or party grieved the ſum of 100 *l.*, and for the 2d offence the ſum of 200 *l.*, and ſhall and is hereby made incapable to hold or execute his ſaid office, the ſaid penalties to be recovered by the party grieved, his executors or adminiſtrators, againſt ſuch offender, his executors or adminiſtrators." He then argued that it appeared clearly from theſe words to have been the intention of the Legiſlature that in caſe of default by any of the inferior officers, the head gaoler ſhould be reſponſible, and that this agreed with the general principle of law *reſpondeat ſuperior*; that the ſame intention further appeared from comparing the above ſection of the act with the 2d ſection, which directs "that whenſoever any perſon or perſons ſhall bring any *habeas corpus* directed unto any ſheriff or ſheriff's gaoler, miniſter, or other perſon whatſoever, for any perſon in his or their cuſtody, and the ſaid writ ſhall be ſerved on the ſaid officer, or left at the goal, that the ſaid officer or officers, his or their under-officers, under-keepers or deputies, ſhall within three days make return of ſuch writ and bring up the body;" for that if the gaoler was ſubjected to penalties for neglecting to obey a writ of *habeas corpus* left at the gaol, the probable intention of the Legiſlature was that he ſhould alſo be liable for neglecting to give a copy of the warrant within ſix hours after demand made upon the turnkey; and that if this conſtruction were not to prevail, the proviſions might be defeated by the principal keeping out of the way.

Lord ALVANLEY Ch. J. I aſſent to the argument which has been advanced in favour of the Plaintiff, ſo far as it goes to ſtate that the *habeas corpus* act is a remedial law; and that the Judges of every court are bound to enforce its proviſions according to their ſpirit, in ſuch a manner as moſt effectually to relieve the ſubject from illegal impriſonment. But though it be a remedial law ſo far as it reſpects thoſe perſons for whoſe protection it was framed, it is grievous in its penalties with reſpect to thoſe perſons who neglect the duties thereby impoſed upon them. It is remedial *quoad* ſome perſons, but it is penal *quoad* others. It becomes incumbent upon the Court therefore to take care that thoſe who claim the benefit of this act have uſed due diligence on their own part, and that they avail themſelves of the proviſions of the act for the real purpoſe of obtaining the rights intended to be ſecured to them. Though we are bound to look with jealous eyes at all thoſe who may be ſuſpected of having wilfully infringed the proviſions of this act, we muſt ſtill take care that no perſon makes uſe of ſo remedial a law for the purpoſe of loading with penalties thoſe who, if they had had notice, would not have diſobeyed its directions. If a priſoner therefore be deſirous of availing himſelf of that part of the ſtatute which inflicts a penalty on the gaoler for neglecting to comply with his demand of a copy of his warrant of commitment, he muſt ſo conduct himſelf that there may be no reaſon to ſuſpect that the object of his demand was not a copy of the warrant, but an opportunity to bring an action. The queſtion then in this caſe is, on whom ought the ſervice of the demand to have been made? I admit that it is ſufficient if the ſervice be made upon the perſon who has the cuſtody of the priſoner; and that if the principal be not preſent and acceſſible to the priſoner, that ſervice on the deputy who at that time has the cuſtody of the priſoner will make the principal anſwerable. But in conſtruing the words "officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or deputy," may we not underſtand them to relate to the principal in the firſt place, and if he be not preſent then to any other perſon who in his abſence ſhall have the cuſtody of the gaol? Can we ſuppoſe that they were intended to extend to every porter at the gates of the priſon? or can we ſay that a turnkey is an under-keeper within the true meaning of the expreſſions; it being ſtated that the gaoler was at that time in the gaol, and therefore acceſſible to all the priſoners? The caſe then ſtands thus. A priſoner about ſix o'clock in the evening puts into the hands of an ignorant turnkey, notice of a demand of a copy of the warrant, directed to the gaoler; the turnkey is not called as a witneſs; it does not appear that the nature or exigency of the demand was explained to him, poſſibly he could not read, and if he could the notice does not expreſs the exigency of the demand, and the turnkey was not at the time the keeper, the under-keeper, or the deputy, ſince the principal was amenable to the notice. But was the notice put into the hands of the turnkey for the purpoſe of obtaining that which was the object of the demand? It does not appear oſtenſible that the Plaintiff made any inquiry, or took any pains that the notice ſhould come to the hands of the Defendant; yet there was a door

1801.
HUNTLEY
v.
LUSCOMBE.

door to the Defendant's houſe which opened into the yard of the priſon, and if it had been intended by the Plaintiff that the demand ſhould be literally complied with by a delivery of a copy of the warrant by 12 o'clock at night, is it to be conceived that he would have been ſo remiſs? If indeed he had been informed at the door that the Defendant was not acceſſible, leaving a notice at the door might have been ſufficient; for the gaoler is bound to have ſome perſon to anſwer for him: but I cannot think that this ſervice upon a common turnkey is ſuch a reaſonable and proper ſervice as to entitle the Plaintiff to maintain an action which ſeeks to recover a heavy penalty denounced by the Legiſlature againſt perſons wilfully neglecting their duty, in order to facilitate the delivery of priſoners from illegal impriſonment. He who ſeeks a remedy muſt do his part: and if it appear to the Court that his object is not a copy of the warrant, but an action; or if by his conduct he has brought the Defendant into a ſituation in which he would not have been placed had he had reaſonable notice, I cannot think that the efficacy of the ſtatute will be done away, by holding that the Plaintiff has not entitled himſelf to maintain an action for the penalty againſt a perſon with whom he has ſo dealt. Without therefore entering into any diſcuſſion upon the former point, I am of opinion that the nonſuit was right.

HEATH J. I entirely concur in opinion with my Lord; but as this is a matter of conſequence, and reſpects an act which is deſervedly popular, I ſhall deliver my opinion the more at large. In the firſt place, therefore, though I admit that this is a remedial ſtatute, (and if I know my own heart, I ſhould be the laſt perſon to concur in any deciſion tending to weaken this act, which was made to ſecure the liberty of the ſubject,) yet I conſider it as penal with reſpect to this Defendant. We muſt therefore take particular care that its proviſions are not perverted to purpoſes of iniquity and oppreſſion. The governor of the gaol being preſent, I think it was neceſſary that the Plaintiff or ſome perſon on his behalf ſhould have made a demand on him; or ſhould at leaſt have demanded acceſs to him. It does not appear but that if any perſon had deſired to ſee the governor, he might have done ſo. Inſtead of this a notice is put into the hands of the turnkey, without any explanation of its contents; the governor being at that time in the gaol. I agree that the ſecond and fifth ſections of the act muſt receive the ſame interpretation. The reaſonable con-

1801.
Huntley
v.
Luscombe.

ſtruction is, that if the governor be preſent there is then no deputy or under-keeper on whom the ſervice can be made; but if the governor be not preſent then the deputy may be ſerved; and if the deputy have no deputy, then in the abſence of the deputy ſervice may be made on the turnkey, or may be left at the gaol, for it is the duty of the governor to leave ſome perſon in his place. The rule *reſpondeat ſuperior* only applies where the ſuperior is abſent. This being the caſe, according to my apprehenſion of the ſecond and fifth ſections of the act, the ſervice of the notice was not ſufficient. I am therefore of opinion that the action in this caſe is not maintainable, eſpecially as there is reaſon to believe that this ſervice of the notice was only intended as a ſnare to entrap the Defendant.

Rooke J. I ſhould be as unwilling as any man to concur in any thing injurious to the rights of the ſubject. The *habeas corpus* is a very wiſe and beneficial ſtatute: and the Judges have always been diſpoſed to put ſuch a conſtruction upon it as will favour the real liberty of the ſubject. But we muſt be careful that thoſe acts which have been made for the benefit of the ſubject, are not turned into engines of oppreſſion: nor muſt we, under the idea of promoting general liberty, withhold that degree of favour from individuals which is conſiſtent with the ſecurity of the public. It appears to me therefore that gaolers are entitled to all the protection which the law can afford them conſiſtently with the liberty of the ſubject. By the fifth ſection of the act it is provided, that if any officer, his under-officers, under-keepers, or deputy, ſhall neglect or refuſe to make return to a writ of *habeas corpus*, or bring up the body, as directed by the ſecond ſection, or upon demand made ſhall refuſe or neglect to deliver within ſix hours a copy of the warrant of commitment, the head gaolers and keepers, and ſuch other perſons in whoſe cuſtody the priſoner ſhall be detained, ſhall be liable to a penalty. Now I think the true conſtruction of this latter part of the act is, that if the gaoler be within the gaol and acceſſible, the demand muſt be made on him; but if he be not acceſſible it may be made on the deputy. At any rate, however, the demand ſhould have been ſerved in ſuch a way that the perſon to whom it was delivered ſhould underſtand its nature, and ſome pains ſhould have been taken that it ſhould come to the hands of the principal. On this view of the ſtatute, and of the circumſtances of this caſe, I can neither reconcile it to juſtice nor to a love of liberty to hold that the Defendant in this action is liable to the penalty. Such a doctrine would be founded on no principle but that of oppreſſion. In this caſe I ſuſpect that the notice was delivered for the expreſs purpoſe of founding an action; and if it be poſſible that the proviſions of the ſtatute ſhould be ſo perverted, it is our duty to take care that ſuch a perverſion ſhould be prevented.

CHAMBRE J. I entirely concur with the reſt of the Court in the conſtruction which has been put upon this ſtatute, and I have little to add to what has already been ſaid. There is no doubt that this act is to be conſidered as a remedial act, and indeed the moſt highly remedial act which ſtands upon the ſtatute book. But the moſt remedial act may contain penal clauſes; and if the argument which has been urged on the part of the Plaintiff were ſound, this act would be moſt oppreſſive in its conſequences; ſince it might ſubject a perſon to heavy penalties, and perhaps to an incapacity to hold his office, though he might be as innocent as any man living. It is true that the diſability to hold the office is not incurred upon the firſt conviction: but the firſt conviction is one ſtep towards it, and if a perſon may innocently become liable to a firſt conviction, he may in the ſame manner become liable to a ſecond. This ſtatute therefore is highly penal in theſe reſpects. At the ſame time we muſt not fritter away the ſalutary proviſions of the act by too liberal a conſtruction. The words of the ſtatute "officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or deputy," are all deſcriptive of the perſons having the actual cuſtody of the priſoner at the time, and if there were any doubt upon this point, I think that the concluſion of the clauſe which ſubjects "the head gaolers and keepers of ſuch priſons, *and ſuch other perſon in whoſe cuſtody the priſoner ſhall be detained*," (*a*) to the penalties, would operate ſtrongly to explain that doubt. Whatever the views of the Plaintiff may have been in bringing this action, ſhe has certainly not proved her caſe

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(*a*) It may be obſerved, however, that the expreſſion "other perſon having priſoners "in his cuſtody," is uſed in the ſecond ſection to denote the ſuperior officer of the priſon, in contradiſtinction to his under-officers: it ſhould ſeem therefore that when the fifth ſection provides that in caſe of any default either of the ſuperior or inferior officers, "the *head* gaolers and keepers, and "ſuch other perſons in whoſe cuſtody the "priſoner ſhall be detained," ſhall be liable to the penalty, it muſt be conſtrued to impoſe the penalty upon the ſuperior officers of the priſon only, and not on the perſon in whoſe actual cuſtody the priſoner may be at the time.

as ſatisfactorily as ſhe might have done; ſhe has been remiſs in not calling the turnkey to ſhew at what time the notice came to the hands of the Defendant. Service on a turnkey may be good for many purpoſes, but we muſt look to the nature of the preſent demand in order to decide whether it be good or not in this particular caſe. It is the duty of a turnkey to take care of the door; could he therefore have complied with this demand? If then the demand never came to the hands of the principal, where is the juſtice and where is the advantage to the public in ſubjecting him to the penalty for non-compliance with the demand? Upon the whole, I am perfectly ſatisfied with the conſtruction which has been put upon this act of Parliament.

Rule diſcharged.

Nov. 20th.

SCHOLEY v. DANIEL.

A. being indebted to B. in 700*l.* applied to C. to lend him that ſum, who agreed ſo to do provided A. would allow him to deduct therefrom 80*l.* due from B. to himſelf upon ſtock-jobbing tranſactions. Accordingly C. advanced 620*l.* and A. gave him a promiſſory note for 700*l.* A. then paid over to B. the 620*l.* who gave him a diſcharge for the whole 700*l.* The promiſſory note for 700*l.* given by A. being paid when due, B. brought an action againſt C. to recover 80*l.* as money had and received by C. to his uſe. Held that B. could not maintain the action, but that it muſt be brought by A. if by any one.

THIS was an action for money had and received.

At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt Term, it appeared that the Plaintiff's ſon being indebted to him in the ſum of 700*l.* and being preſſed for payment repreſented his ſituation to the Defendant, and applied to him for the loan of 700*l.*; the Defendant anſwered that he would have nothing to do with the Plaintiff, for that the Plaintiff was already in his debt upon ſtock-jobbing tranſactions to the amount of 80*l.* which he had refuſed to pay; but that he, the Defendant, would lend the Plaintiff's ſon the money if he would allow him to deduct the 80*l.* which his father owed; that the Plaintiff's ſon acceded to this offer, and accordingly received 620*l.* from the Defendant, and gave the latter his promiſſory note for 700*l.* and lodged with him the leaſe of a houſe as a collateral ſecurity; that the Plaintiff's ſon repaid his father 620*l.* and that his father reſolving that the Defendant ſhould not retain the 80*l.* gave his ſon credit in account for the 80*l.* which he had paid to the Defendant, and conſidered the debt between his ſon and himſelf ſatisfied; the note for 700*l.* being paid when due and the leaſe reſtored to the ſon, the preſent Plaintiff commenced this action to recover the 80*l.* which the Defendant, in order to repay himſelf a debt founded on an illegal conſideration, had deducted from the 700*l.* advanced to his ſon. A verdict was taken for the Plaintiff, reſerving liberty to the Defendant to move the Court that this verdict ſhould be ſet aſide and a nonſuit entered.

Accordingly a rule *niſi* having been obtained for that purpoſe,

Beſt Serjt. now ſhewed cauſe, and contended that it appeared clearly from the evidence that the Defendant had obtained money without conſideration which he had no right to retain, but that the only queſtion was, who ought to have brought the action? that the Plaintiff's ſon having received credit in account for the amount of the ſum retained, had no cauſe to complain, and that he therefore could not be entitled to any action againſt the Defendant; but that the father, who was the only loſer by the tranſaction, had clearly a right to maintain this action, the object of which was to recover that ſum of money from the Defendant which he unjuſtly retained, and which the Plaintiff ought to receive.

Shepherd and *Bayley* Serjts. inſiſted that as the money which had been received by the Defendant was neither paid by the Plaintiff nor with his money, he could not be entitled to maintain this action; and that any tranſaction between the Plaintiff and his ſon to which the Defendant was no party could not vary the caſe.

Lord ALVANLEY Ch. J. This is not money had and received to the uſe of the father. The ſon has thought fit to pay a ſum of money to the Defendant, but there was no tranſaction between the Defendant and the father. There was no undertaking either expreſs or implied on the part of the Defendant to repay this money to the Plaintiff; and the Plaintiff's ſon, if any one, ought to have brought the action.

HEATH J. I think there can be no doubt on the queſtion. It was the policy of the common law to forbid the transfer of rights of action. If this were not forbidden men would often pay the debts of others and bring actions upon them to the great increaſe of litigation.

ROOKE and CHAMBRE Js. were of the ſame opinion.

Rule abſolute.

Nov. 20th.

Roe ex dim. Pellatt and Others *v.* Ferrars, Clerk.

J. S. demiſed lands to the rector of *D.* for 40 years at a certain rent; in the leaſe the rector, after covenanting for payment of the rent, further granted to *J. S* the tithe of oats of the pariſh of *D.*; the leaſe alſo contained a proviſo for re-entry in caſe the rent ſhould be in arrear, or *J. S.* his heirs, &c. ſhould be diſturbed by the rector or his aſſigns in the receipt of the tithe, and concluded with a covenant on the part of *J. S.* that the rector ſhould quietly enjoy the lands under the covenants, grants, and agreements contained in the leaſe. After the expiration of the leaſe the rectors continued to hold the land, but withheld the rent for more than 20 years, the heirs of *J. S.* at the ſame time continuing to take the tithe of oats, and ſome confuſion exiſting as to the reſpective rights of the rector and the heirs of *J. S.* the latter being portioniſts of the tithes of the pariſh. Held that the poſſeſſion of the land by the rector was not adverſe, ſo as to let in the operation of the ſtatute of limitations.

If a Defendant give in evidence an anſwer in Chancery of the Plaintiff, it will not entitle the Plaintiff to avail himſelf of any matters contained in ſuch anſwer which are only ſtated as hearſay. *Semb.*

This ejectment was tried before *Heath* J. at the *Lent Surrey* Aſſizes, and a verdict found for the Plaintiff as to certain lands called *The Sharps*, ſituate in the pariſh of *Beddington*, ſubject to the opinion of the Court, whether the Plaintiffs' right of recovery in this action was not barred by the ſtatute of limitations.

The leſſors of the Plaintiff, who were lords of the manor of *Beddington*, ſought to recover theſe lands as parcel of the manor, and the Defendant, who was rector of the pariſh of *Beddington*, diſputed their title claiming them as parcel of the rectorial glebe. The lords of the manor of *Beddington* had the right of preſentation to the rectory; and were alſo entitled to a portion of the tithes. At various times there had been a mutual interchange of lands and tithes between the lords of the manor and the rectors, which had given riſe to much confuſion concerning their reſpective rights. To prove poſſeſſion in the leſſors of the Plaintiff a deed was produced, dated on the 18th of *November* 1703, by which the then lords of the manor demiſed to one *Richard Reddall*, parſon of *Beddington*, the lands in queſtion (among others) for 40 years, "yielding and paying therefore yearly during the ſaid term, the ſum of forty-three ſhillings and fourpence, and alſo paying and delivering yearly during the ſaid term at the barn-door, in the yard of the manſion-houſe, all the tithe ſtraw both of wheat and rye coming and growing within the pariſh of *Beddington*, and alſo 7 quarters of wheat, 4 quarters of rye, and 30 quarters of barley." The deed then went on, "and the ſaid *Richard Reddall*, for himſelf, his executors, &c. doth covenant, promiſe, and grant to and with the ſaid Sir *J. J.* &c. (the lords of the manor), their heirs, &c. that he the ſaid *Richard Reddall* ſhall not only well and truly pay, or cauſe to be paid from time to time, and at all times during the continuance of this preſent demiſe unto the ſaid Sir *J. J.* &c. their heirs, &c. the ſaid yearly rent of forty-three ſhillings and fourpence at the ſaid manſion-houſe, but alſo ſhall and will deliver the ſaid tithe ſtraw, together with the ſaid wheat, rye, and barley, in ſuch manner and form as the ſame ſhall grow due and payable by virtue of theſe preſents; and further the ſaid *Richard Reddall* doth grant unto the ſaid Sir *J. J. &c.* their heirs, *&c.* that they ſhall have and enjoy all the tithe oats hereafter to be ariſing or growing within the ſaid pariſh of *Beddington*, to be yearly taken by the ſaid Sir *J. J. &c.* their heirs, *&c.* during the ſaid term (except the tithes of the glebe lands and portionary hereby demiſed, while it is in the ſaid parſon's own occupation); provided always that if the ſaid yearly rent of forty-three ſhillings and fourpence, or any part thereof, ſhall be behind and unpaid by the ſpace of one-and-twenty days, next after any of the feaſt days on which the ſame ought to be paid as aforeſaid, being lawfully demanded, or if the ſaid corn or ſtraw above-mentioned be not well and truly delivered in manner and form aforeſaid, within 14 days next after requeſt thereof made as aforeſaid, or if the ſaid Sir *J. J. &c.* their heirs, *&c.* ſhall be moleſted or troubled by the ſaid *Richard Reddall* or his aſſigns, in taking or enjoying the ſaid tithe-oats by theſe preſents mentioned to be granted as aforeſaid, that then and from thenceforth it ſhall and may be lawful for the ſaid Sir *J. J. &c.* their heirs, *&c.* into the ſaid demiſed premiſes, with all and ſingular their appurtenances to re-enter, and the ſame to have again as in their former eſtate." At the concluſion of the deed there was a covenant by the lords of the manor, that "the ſaid *Richard Reddall* and his aſſigns ſhall quietly and peaceably enjoy the ſaid demiſed premiſes, paying the yearly rent, and under the covenants, grants, and agreements before in theſe preſents contained, without any lawful let or interruption of them the ſaid Sir *J. J. &c.* their heirs, *&c.* during the ſaid term." To rebut this evidence, and ſhew an adverſe poſſeſſion, the Defendant read an anſwer to a bill in equity of a late date, filed by himſelf againſt the leſſors of the Plaintiff, for an account of the tithe of oats which he then claimed, in which, though they did not mention the deed of 1703, yet they referred to a ſimilar leaſe of a much older date, and ſtated that ſuch leaſes had from time to time been granted to the rectors by the lords of the manor, and that about 1753, upon ſome diſpute between Sir *N. H. Carew* the then lord of the manor and the Reverend *John Pryce*, then incumbent of the living of *Beddington*, the latter taking advantage of the former being a man of an indolent temper and inattentive to buſineſs, *withheld* the rents reſerved on the lands in queſtion, but permitted him to continue to take the tithe of

1801.
Roe ex dim. Pellatt and Others v. Ferrars.

of oats. Upon the above part of the anſwer being read in evidence by the Defendant, the counſel for the Plaintiff alſo read the following ſentence from the ſame anſwer: "That the leſſors of the "Plaintiff had heard as truth that the ſaid *John Pryce* did pay or de- "liver to the ſaid Sir *N. H. Carew*, divers quantities of corn and "ſtraw, and that the ſaid Sir *N. H. Carew* did receive the tithe of "oats within the ſaid pariſh;" which corn and ſtraw he inſiſted were delivered by way of render, and the tithe of oats received in conſideration of the demiſe, and on the footing of the ſeveral agreements contained in the ſeveral leaſes. No rent appeared to have been paid by the rectors of *Beddington* to the lords of the manor ſince the year 1753; but the latter continued to take the tithe of oats until a decree made in favour of the rector in conſequence of the above-mentioned bill in equity. The preſent Defendant was inſtituted to the living of *Beddington* in the year 1782, and it was not till after that period that the leaſe of 1703, which had been loſt, was diſcovered.

A rule *niſi* for ſetting aſide the verdict having been obtained in *Eaſter* Term laſt, the caſe was argued by *Beſt* Serjt. for the Plaintiffs, and *Shepherd* and *Bayley* Serjts. for the Defendant, and the Court took time to conſider of their opinion, during which time Lord *Alvanley* ſucceeding to the ſituation of Chief Juſtice, it was again argued on a former day in this Term by the ſame counſel.

Arguments for the Plaintiffs. It is perfectly clear that the ſtatute of limitations cannot operate unleſs an adverſe poſſeſſion in the Defendant be ſatisfactorily eſtabliſhed. Now in the preſent caſe the poſſeſſion of the ſeveral incumbents of the living of *Beddington* muſt be deemed the poſſeſſion of the lords of the manor of *Beddinton* until a very ſtrong caſe can be made out to prove that the tenancy under which the former originally came into poſſeſſion of the premiſes had completely determined. But here though the rents reſerved in the leaſe of 1703 have not been paid for above 20 years to the lords of the manor, ſtill as the latter have been permitted to take the tithe of oats up to a very recent period, the poſſeſſion of the incumbent is a mere poſſeſſion by conſent of the lords; for as long as any part of the rent reſerved continues to be paid, the poſſeſſion is not adverſe. It is to be obſerved that the grant of the tithe of oats to the lords of the manor is not contained in a diſtinct deed, but is part of that very leaſe under which the lands in diſpute were demiſed to the incumbents of the living, and forms one of the expreſs terms of the deed. It is true that it is not part of the *reddendum;* but being inſerted in the ſame deed, it muſt be taken to be part of the conſideration of the demiſe. That it was part of the conſideration is manifeſt from the clauſe of re-entry which is limited to take effect not only in caſe of the rent being behind or unpaid, but in caſe the lords of the manor ſhould be moleſted or troubled in taking the tithe of oats. And this is ſtrongly confirmed by the covenants on the part of the lords of the manor with which the deed concludes, that the leſſee ſhall quietly enjoy the premiſes, "paying the yearly rent, and under the covenants, grants, and agreements before in theſe preſents contained." Poſſibly in the year 1753 the *Carew* family finding the rent reſerved too large, agreed with the then rector to allow him to retain the lands in queſtion for the ſingle conſideration of the tithe of oats, remitting all the other renders.

Arguments for the Defendant. Had the incumbents of the living of *Beddington* been holding up to the preſent period under an exiſting leaſe, their refuſal to pay rent would not have created an adverſe poſſeſſion. But here the leaſe under which the tenancy commenced, expired in 1743, ſince which time they have claimed to hold *proprio jure.* The refuſal to pay the rent was a diſclaimer of the title of the lords of the manor, and if the latter really had title they might then have brought their ejectment, to ſupport which no notice to quit would have been neceſſary. It is true that the lords of the manor have been permitted to take the tithe of oats: but that permiſſion only continued becauſe the incumbents did not know under what title the lords of the manor claimed the tithe; and at any rate was a permiſſion by the incumbents in their character of parſons and not in their character of tenants. It would have been a very different caſe had it been in evidence that the incumbents knew that they had the common law right to the tithe of oats; and that the lords of the manor could not claim it except as a render for the lands in queſtion. The mere taking of the tithe is not ſufficient to defeat the adverſe poſſeſſion, unleſs it has been taken *eo intuitû* as rent. Indeed it appears that the incumbents refuſed to permit the lords of the manor to take that which was expreſsly reſerved as the rent; it is therefore to be preſumed that they were ſuffered by the incumbents to take the tithe of oats un-

Roe ex dim. Pellatt and Others v. Ferrars.

der the apprehenſion that they were entitled to them in ſome other right than that which grew out of the leaſe, and probably the confuſion aroſe from the circumſtance of their being portioniſts of the tithe together with the rector. Beſides, the grant of the tithe of oats is perfectly diſtinct from the reſervation of the rent; and although it is provided that the lords of the manor ſhall have a right to enter upon the land in caſe of their being diſturbed in taking the tithe, yet it does not follow that the tenure of the land depends on the incumbents ſuffering the lords of the manor to take the tithe. It does not lie on the Defendant to make out a ſtrong caſe of adverſe poſſeſſion, but on the Plaintiff to eſtabliſh his own title clearly and ſatisfactorily.

Lord Alvanley Ch. J. If the rules of law will permit me to do otherwiſe, I ſhall be very ſorry to give any countenance to the defence which has been reſorted to in the preſent caſe. And the more ſo, becauſe the two parties in aſcertaining their reſpective rights meet upon very unequal terms; the one as the repreſentative of the church, being barred by no lapſe of time in the claim of any dormant rights, whereas the other has to encounter the difficulties oppoſed to him by the ſtatute of limitations. It is not diſputed that the premiſes in queſtion were demiſed to the rectors of *Beddington* by the predeceſſors of the preſent leſſors of the Plaintiffs, reſerving to themſelves certain rents, and alſo the tithe of oats within the pariſh. Since the year 1753 the rectors have ceaſed to pay the rents reſerved in the leaſe, but the *Carew* family have continued to receive the tithe. Poſſibly therefore at the time at which the rents were withheld, it was agreed between the then rector and the repreſentative of the *Carew* family, that if the latter were permitted to receive the tithe as before, the former ſhould be permitted to retain the land demiſed. Conſidering therefore that this is a queſtion to be ſubmitted to a jury, and underſtanding from the learned Judge who tried the cauſe that whatever was conteſted at the trial was ſubmitted by him to the jury, I am of opinion that the preſent verdict ought not to be diſturbed.

Heath J. The doctrine of remitter furniſhes a ſtrong analogy in favour of the preſent leſſors of the Plaintiffs; for the rule is that a man who is in by a *puiſné* eſtate ſhall be remitted without any act of his own, but by mere operation of law to his

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1801.
Roe ex dim. Pellatt and Others *v.* Ferrars.

eigné eſtate (*a*). Now that rule ſeems to me very applicable to the preſent caſe, for it is clear that the *Carew* family continued to receive the tithe of oats, and therefore ſhould, as it appears to me, be held to have received them in that right which they acquired under the demiſe by which they granted the premiſes in queſtion. Beſides it is to be recollected that this queſtion ariſes upon the ſtatute of limitations, which always receives a ſtrict conſtruction from the Courts.

Rooke J. It is clear that the *Carew* family and the rectors of *Beddington* agreed to create the relation of landlord and tenant between themſelves by the leaſe of 1703, and up to the preſent time the one has continued to receive the tithe and the other to hold the land. The preſent rector attempts to avail himſelf of a rule of law highly favourable to the church, by which he may without any limitation of time reclaim the tithe granted as a conſideration for the enjoyment of the land in queſtion by his predeceſſor, and yet prevent the *Carew* family from reclaiming their land by ſetting up the ſtatute of limitations in bar of their demand. This is ſo unjuſt that I ſhall be glad to find out any ground upon which we may be enabled to defeat his attempt. Now it does appear to me that the former rectors of the pariſh may be preſumed to have intended to do juſtice, and therefore to have permitted the *Carew* family to receive the tithe of oats by way of compenſation for the land which they continued to hold. If ſo, the preſent rector not having ſucceeded to the living till 1782, the poſſeſſion of the premiſes in queſtion was not adverſe up to that period, and ſince that period 20 years have not elapſed. Upon the whole therefore I think there ought not to be a new trial.

Chambre J. Upon this queſtion I have entertained conſiderable doubts; nor indeed is my mind altogether free from doubts at the preſent moment. Thoſe doubts do not reſpect the juſtice of the caſe, for that is moſt clearly with the leſſors of the Plaintiff.

(*a*) With reſpect to this analogy however it is to be obſerved, that remitter never operates to deveſt a tortious freehold, in order to reveſt a rightful term for years; the latter title being of no eſteem in the law. 2 *Roll. Abr. tit. Remitter*, *F.*, *fo.* 420. *l.* 35. *Com. Dig. tit. Remitter*, *c.* 7. But the right to the tithe claimed by the *Carew* family as portioniſts was a freehold, whereas the right derived under the leaſe was but a right to take from year to year, ariſing out of the implied *aſſumpſit* which reſulted from the Defendant holding over the lands in queſtion after the expiration of the leaſe. It may further be obſerved, that as the *Carew* family never had been out of poſſeſſion of the tithe from the time when the leaſe was granted to the time when the Defendant was inſtituted to the rectory, if any right to the tithe under the implied *aſſumpſit* remained in them at this latter period, the right and the poſſeſſion never having been ſeparated, the eſtate was complete without the operation of remitter.

I am not indeed altogether without ſuſpicion that the contract entered into between the rectors of *Beddington* and the *Carew* family originated in ſimony; the latter reſerving to themſelves much more than they were entitled to under the name of a compenſation for the manor houſe and lands. But however that may be, it will not affect the preſent queſtion. If this caſe were to be again ſubmitted to a jury, I think they might fairly conclude that in 1753 the then rector of *Beddington* quarrelled with the terms of his leaſe, and though he refuſed to continue the ſtipulated renders to the *Carew* family, yet permitted them to receive the tithe of oats. Poſſibly at the trial the queſtion was not put to the jury quite ſo fully as it might have been, but reſerved rather too much as a dry point of law. Indeed could I be convinced that the jury had conſidered and decided the preciſe queſtion, my doubts would be removed. Certainly in the litigation of their reſpective rights, theſe parties contend on very unequal terms; the rector availing himſelf of a maxim of law in favour of the church to which the *Carew* family as laymen cannot reſort. The point however which in this caſe has moſt embarraſſed my mind, is the degree of poſitive proof drawn from the anſwer in Chancery of the leſſors of the plaintiff in their own favour. It is true that it was introduced into the cauſe by the Defendant, on whoſe behalf ſome parts of the anſwer were read. But in thoſe parts on which the leſſors of the plaintiff relied, they ſpeak only to what they "have heard as truth." I think that was not admiſſible evidence, for it appears to me that where one party reads a part of the anſwer of the other party in evidence, he makes the whole admiſſible only ſo far as to wave any objection to the competency of the teſtimony of the party making the anſwer, and that he does not thereby admit as evidence all the facts which may happen to have been ſtated by way of hearſay only in the courſe of the anſwer to a bill filed for a diſcovery (*a*). This point does not indeed appear to have been

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(*a*) But all the caſes agree that where part of an anſwer is read againſt a party he may inſiſt on having the whole read, *Lynch* v. *Clerke*, 3 *Salk.* 154. *per Holt* Ch. J. or at leaſt on reading the remainder himſelf. The *Earl of Bath* v. *Batherſea*, 5 *Mod.* 9. *Gilb. Law of Ev.* 51 *Ed.* 3. unleſs the part read be merely to ſhew the incompetency of a witneſs as intereſted in the event of the cauſe, *Sparin* v. *Drax*, *Mich.* 27 *Car.* 2. *Bull. N. P.* 238, 2d ed. An anſwer indeed being treated as the admiſſion of the party againſt whom it is read, it does ſeem reaſonable that the whole admiſſion ſhould be read to the Jury for the purpoſe of ſhewing under what impreſſions that admiſſion was made, though ſome parts of it be only ſtated upon *hearſay* and *belief*. But whether the party againſt whom the anſwer is read be entitled to have ſuch parts of it as are not expreſsly ſworn to left to the Jury as evidence (however ſlight) of any fact, does not appear to have been hitherto decided.

conteſted at the trial. Had it been conteſted I ſhould have thought the Court bound to ſend the caſe down to a new trial. Upon the whole however, I am diſpoſed to concur with my Lord and my brothers, that there ought not to be a new trial in this caſe.

Rule diſcharged.

M'Connell v. Hector.

Nov. 23d.

In an action of treſpaſs directed by the Lord Chancellor to try a queſtion of bankruptcy, the Court of *C. B.* will not reſtrain the Defendant from pleading the general iſſue together with ſpecial juſtifications.

Marshall Serjt. ſhewed cauſe againſt a rule for pleading ſeveral matters to a declaration in treſpaſs for taking goods; the pleas were, 1ſt, not guilty; and, 2dly and 3dly, two ſpecial juſtifications under two of the acts of Parliament reſpecting bankrupts; he ſtated that this was an action directed by the Lord Chancellor to try a queſtion of bankruptcy, and that therefore the plea of not guilty, putting in iſſue the taking of the property, would only hamper the plaintiff at the trial, and prevent the parties from litigating the real ſubject of the iſſue.

Beſt Serjt. in ſupport of the rule inſiſted, that as the pleas were not inconſiſtent, the Court would not interpoſe.

Lord Alvanley Ch. J. ſeemed to think that the Court ought to reſtrain the Defendant from pleading a plea which would tend to embarraſs the trial of the only queſtion which the Lord Chancellor wiſhed to have tried.

But the reſt of *the Court* were of opinion that as the pleas were not inconſiſtent, the Defendant ought to be permitted to plead them, and the Plaintiff ought to apply to the Lord Chancellor to prevent the Defendant from taking advantage at the trial of any thing which went to ſhut out the real point at iſſue.

Rule abſolute (*a*).

(*a*) Vide *Shaw* v. *Everett*, *ante*, vol. I. p. 222. *Angerſtein* v. *Vaughan*, *ibid. in notis.* *Lechmere* v. *Rice*, *ante*, p. 12. and *Thyatt* v. *Young*, *ante*, p. 72.

1801.

Nov. 23d.

Bennett *v.* Francis.

Where money is paid into Court generally upon a declaration in contract, it is an admiſſion of the exiſtence of a contract in every tranſaction which is capable of being converted into a contract by the aſſent of the parties. Therefore where a Defendant who had poſſeſſed himſelf of goods belonging to the Plaintiff, and had ſold part and kept the reſidue in ſpecie, paid money into Court generally upon a declaration containing a count for goods ſold and delivered, it was held that he had thereby admitted the tranſaction to have been converted into a contract, and that the Plaintiff was entitled to recover the value of all the goods under the count for goods ſold and delivered.

ASSUMPSIT for goods ſold and delivered, money lent and advanced, money paid, money had and received, and on an account ſtated. The Defendant pleaded generally to the declaration, 1ſt, *non aſſumpſit* as to all except 4*l.* 3*s.*, upon which plea iſſue was joined; 2dly, a tender of the ſaid 4*l.* 3*s.*, and paid this ſum into Court generally. The Plaintiff admitted the tender and took the money out of Court.

The cauſe was tried before *Chambre* J. at the *Guildhall* Sittings after laſt *Eaſter* Term, when it appeared that the action was brought to recover the value of four out of ſix hides belonging to the Plaintiff, which had come to the hands of the Defendant. Two out of the ſix hides had been returned by the Defendant; one had been ſold by him for 1*l.* 12*s.* but the money had not been paid over to the Plaintiff; and the three others remained in the Defendant's poſſeſſion. The Plaintiff conceiving himſelf entitled to the value of all the hides, ſent in a bill of parcels to the Defendant, in which he charged for the four which had not been reſtored to him as follows: "One hide at 2*l.* 10*s.*; two ditto 3*l.*; "one ditto 1*l.* 12*s.*, total 7*l.* 2*s.*" The Defendant did not diſpute the Plaintiff's right to the value of one hide which had been ſold, but claimed the other three as his own. The Jury being ſatisfied that all the ſix hides belonged to the Plaintiff, gave him a verdict for 2*l.* 19*s.*, which, together with the 4*l.* 3*s.* paid into Court, made up the value of the four hides for which the Plaintiff had not received any thing. The learned Judge in making his report obſerved, that the 4*l.* 3*s.* tendered and paid into Court was more than the value of the ſingle hide which had been ſold by the Defendant, and for which the money had not been paid over, and that indeed it did not preciſely appear to what it was intended to be applied. Leave was given to the Defendant to move to enter a nonſuit, if the Court ſhould be of opinion that the Plaintiff could not recover in this action. Accordingly a rule *niſi* for this purpoſe having been obtained on a former day,

Beſt Serjt. now ſhewed cauſe. In a caſe of this kind, though a tort may have been committed by the Defendant, yet the Plaintiff is at liberty to wave the tort and bring his action as upon a contract. The value of the goods being proved, and the receipt of them by the Defendant, it cannot be permitted to the latter to ſay that he obtained them wrongfully in order to avoid the contract by virtue of which the Plaintiff alleges him to have received them. In ſupport of this propoſition may be cited *Feltham* v. *Terry*, cit. *Cowp.* 415, 416. 419. and 1 *Term Rep.* 387. where goods having been taken and ſold under an execution upon a conviction which was afterwards quaſhed, the Plaintiff was allowed to maintain an action for money had and received, though a treſpaſs had been committed. So Lord *Mansfield* in *Hambly* v. *Trott*, *Cowp.* 375. when ſpeaking of the actions which are maintainable againſt an executor, ſeems to hold the ſame doctrine; he ſays, "in moſt if not in all the caſes where trover lies againſt the teſtator another action may be brought againſt the executor which would anſwer the ſame purpoſe." Indeed he obſerves, that an action on the cuſtom of the realm againſt a common carrier is for a tort and ſuppoſed crime, yet *aſſumpſit*, which is another action for the ſame cauſe, will lie; and that if a man take a horſe from another and bring him back again, though treſpaſs will lie againſt him, yet an action for the uſe and hire of the horſe will lie againſt his executor. Though Mr. Juſtice *Buller*, in *Birch* v. *Wright*, 1 *Term Rep.* 386. ſeemed to doubt the authority of a caſe there cited as decided at the *Launceſton* Aſſizes, when Mr. Juſtice *Gould* was at the Bar, in which it was held that uſe and occupation might be maintained for the value of premiſes held after the time of the demiſe laid in an ejectment tried at the ſame Aſſizes, yet he expreſsly recognized the authority of *Feltham* v. *Terry* as deciding that the tort might be waved and an action maintained for the money due. It is true that in *Lindon* v. *Hooper*, *Cowp.* 414. where the Plaintiff had paid money for the releaſe of his cattle which had been wrongfully diſtrained, the Court held that he could not maintain an action for money had and received, but that treſpaſs or replevin was the proper remedy. But the ground of that deciſion was, that the Defendant would be laid under great difficulty by the form of action adopted by the Plaintiff, ſince he could not be prepared to make his defence unleſs the Plaintiff's right was ſtated upon record, which it would be in treſpaſs or replevin. But the ſame objection does not apply to the preſent caſe, where the Defendant learns nothing more of the Plaintiff's right from the pleadings in trover than he does from the pleadings in *aſſumpſit*. And indeed the Defendant in the latter form

1801.

BENNETT
v.
FRANCIS.

form of action is entitled to an advantage, *viz.* that of a ſet-off, of which he could not avail himſelf in the former. At any rate, however, the payment of money into Court amounts to an admiſſion on the part of the Defendant that the tranſaction between the parties, though originally a tort, had been converted into a contract: it is therefore no longer competent to the Defendant to object to the form of the action. It was contended at the trial that the money paid into Court could only apply to the money actually received by the Defendant: but in anſwer to this it may be obſerved, that the Defendant has paid into Court 4*l.* 3*s.*, whereas if he had intended to confine his payment to the tranſaction reſpecting the money received, he would only have paid in the exact ſum received, *viz.* 1*l.* 12*s.*, and would have ſpecifically applied the payment to the count for money had and received. In *Burrough* v. *Skinner*, 5 *Burr.* 2639. which was an action brought by a purchaſer to recover back the depoſit from an auctioneer in conſequence of an objection to the title, the queſtion was, whether the auctioneer was liable, and the Court held that having paid money into Court he had acknowledged himſelf liable to the action. So in *Watkins* v. *Towers*, 2 *Term Rep.* 275. it was held, that giving evidence of a rule of *K. B.* for payment of money into Court was a ſufficient compliance with an undertaking, to give evidence of ſome matters in iſſue ariſing in *Middleſex*; becauſe it admitted the cauſe of action and ſuperſeded the neceſſity of all that proof which the Defendant muſt otherwiſe have given. Lord *Kenyon* likewiſe, in *Baillie* v. *Cazalet*, 4 *Term Rep.* 579. ſays, "where a Defendant pays money into Court on ſome of the counts only, it is ſaying in other terms, that he admits the Plaintiff has a cauſe of action againſt him to a certain extent, but that he means to defend himſelf againſt the charges contained in the other counts;" from which it may be inferred that if the money had been paid in generally, his Lordſhip would have conſidered it as an admiſſion of a cauſe of action on all the counts. Indeed in *Gutteridge* v. *Smith*, 2 *H. Bl.* 374. it was expreſsly decided that payment of money into Court generally in an action on a bill of exchange diſpenſed with the neceſſity of proving the handwriting of the drawer. It is true that payment of money into Court does not admit an illegal demand beyond the ſum actually paid in, *Cox* v. *Parry*, 1 *Term Rep.* 464.; and that if part of the Plaintiff's demand be legal and part illegal, the Court will not allow the money paid in to be applied to the illegal part, *Ribbans* v. *Crickett*, *ante*, vol. 1. p. 264. But theſe two latter caſes will not affect this caſe, where the objection is not to the legality of the demand, but merely to the form of the action.

Vaughan Serjt. *contrà*, was deſired by the *Court* to confine himſelf to the laſt point.—Payment of money into Court admits a cauſe of action to the extent of the money paid in, and no further. This poſition is expreſsly eſtabliſhed by the caſe of *Cox* v. *Parry*: and in *Gutteridge* v. *Smith*, *Eyre* Ch. J. ſays, that on the authorities there is nothing to ſhew that the cauſe is not in all material reſpects in the ſame ſituation after payment of money into Court as before. With reſpect to the caſe of *Burrough* v. *Skinner*, the only queſtion which there aroſe was this, Whether the Defendant or ſome other perſon were liable on the Plaintiff's demand? and the Court thought that the Defendant, by paying ſomething into Court, had acknowledged himſelf to be the perſon liable: but no objection to the nature of the demand was raiſed: and the caſe of *Watkins* v. *Towers* only goes the length of ſhewing that payment of money into Court is an admiſſion that ſomething is due on the contract ſtated in the declaration, but does not decide that it amounts to any admiſſion of the contract beyond the ſum paid. If the doctrine contended for on the other ſide were to be admitted, this abſurd conſequence would follow, that in an action upon contract where money has been paid into Court generally, the Plaintiff would be at liberty to give in evidence every ſpecies of injury upon which he might be entitled to receive a compenſation from the Defendant, though it ſhould conſiſt of a treſpaſs or even an aſſault, and the Defendant would be precluded from objecting by his ſuppoſed admiſſion that the cauſe of action was not a tort but a contract. With reſpect to the amount of the ſum paid into Court in the preſent caſe, there can be no reaſon for ſuppoſing that it was not intended to be applied to the money actually received by the Defendant, ſince it is always uſual for Defendants on ſimilar occaſions to pay in rather more than is really due.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. who after ſtating the caſe, proceeded as follows: At the trial it was contended for the Plaintiff, that he was at liberty to give in evidence, in order to increaſe the damages beyond 4*l.* 3*s.* not only the value of the ſkin which had been ſold, and for which the money had been received by the Defendant, but alſo, as on a contract for goods ſold and delivered, the value of the ſkins which ſtill remained in the Defendant's poſſeſſion. On the other hand, the Defendant inſiſted that he was not at liberty to give in evidence the value of theſe laſt ſkins on a count for goods ſold and delivered, ſince nothing had paſſed between the parties reducing the tranſaction into a contract of that ſort; and that as to thoſe ſkins the Plaintiff could only proceed in trover. The learned Judge however admitted the evidence, reſerving the point for the conſideration of this Court; and the only queſtion now is, Whether, as the caſe ſtood at the time of the trial, the Judge did right in admitting the evidence upon this count for goods ſold and delivered? When the caſe came on before this Court, a wide field of argument was entered into on this queſtion, namely, whether in all caſes where a party has converted goods of another to his own uſe, it is competent to the Plaintiff to change the tranſaction into a contract for goods ſold and delivered? we thought it right to ſtop the counſel for the Defendant, being of opinion that the caſe would not turn on that point: and I do not now intend to give any poſitive opinion upon it. But thus far I will ſay, that it does appear to me monſtrous to carry the cauſes to any ſuch extent as that which has been contended for, and that they do not warrant the concluſion which has been drawn from them. The caſes cited were *Hambly* v. *Trott*, *Lindon* v. *Hooper*, and *Feltham* v. *Terry*. Lord *Mansfield*, in the caſe of *Hambly* v. *Trott*, confines the doctrine to the caſe of money had and received; and I do not find that the Judges in any of the caſes have gone ſo far as to hold that a tort may, at the option of the Plaintiff only, be converted into a contract. In the caſe of money had and received, where nothing more than the money actually received can be recovered, no injury can ariſe to the Defendant: and indeed he derives ſome advantage, ſince he becomes entitled to avail himſelf of a ſet-off. But where any inconvenience may ariſe to the Defendant, the Court will not allow the principle to be extended, even in the caſe of money had and received; and therefore in the caſe of *Lindon* v. *Hooper*, where the Plaintiff had paid money for the releaſe of his cattle, which had been diſtrained by the Defendant for damage feaſance, the Court refuſed to allow the former to maintain an action for money had and received. All that is to be collected from the caſes is this, that if the goods be converted into money, the Court will allow

1801.
Bennett
v.
Francis.

the Plaintiff to wave the tort and bring an action, in which he can recover nothing more than the ſum actually received. But if it were competent to the Plaintiff in a caſe like this to wave the tort, and convert the tranſaction into a contract, it might involve the Defendant in great difficulties. Goods are demanded of a perſon who claims them as his own, and inſiſts on keeping them. Now if the party demanding the goods be at liberty to convert this into a contract for goods ſold and delivered, the conſequence would be, that on proving his property in the goods the other party would be obliged to pay the value of them, though poſſibly to his utter ruin: whereas if the former had declared in trover, nominal damages only would probably be given, and the goods would be reſtored (*a*). For theſe reaſons, it is my private opinion, and I believe that the reſt of the Court agree with me on this head, that the general propoſition contended for on the part of the Plaintiff cannot be ſupported. But although it be true that the Plaintiff cannot at his option alone convert this tranſaction into a contract for goods ſold and delivered, yet it was hardly contended but that by conſent of both parties it might be converted into ſuch a contract. If goods be demanded by the Plaintiff, upon which the Defendant refuſes to give them up, but ſays that if the Plaintiff will prove his property in them, he the Defendant will pay for them, that will turn the tort into a contract. And the queſtion therefore is, Whether payment of money into Court on a declaration in contract, does not amount to a conſent upon the part of the Defendant that the tranſaction ſhall be treated as a contract? and we are of opinion that it does. With reſpect to the effect of paying money into Court, ſeveral modern caſes have been cited. In *Cox* v. *Parry*, the Plaintiff would have been entitled to recover nothing if the Defendant had not paid money into Court, the policy being illegal: but Mr. J. *Aſhhurſt* obſerved, that the Defendant having paid money into Court he had thereby admitted that the Plaintiffs were entitled to maintain their action on the policy to the amount of the ſum paid in. And in *Baillie* v. *Cazalet* Lord *Kenyon* ſays, "where a Defendant pays money into Court on ſome of the counts only, it is ſaying in other terms that he admits that the Plaintiff has a cauſe of action againſt him to a certain extent: but that he means to defend himſelf againſt the charges contained in the

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(*a*) See 1 *Eſp. N. P.* 597.

the other counts." Now from theſe words I collect the opinion of Lord *Kenyon*, that the payment of money into Court is an admiſſion of a cauſe of action on every count, in every caſe in which a cauſe of action in its nature applicable to any of the counts can exiſt: we are not therefore obliged to admit the abſurd conſequence that evidence may be received of treſpaſs or battery, for ſuch tranſactions are not capable in their nature of being converted into a contract. In the caſe of *Watkins* v. *Towers*, Mr. Juſtice *Aſhburſt* and Mr. Juſtice *Groſe* were of opinion, that evidence of payment of money into Court was a compliance with the rule to give material evidence, becauſe it amounted to an admiſſion of the contract in the declaration. It is true that in *Gutteridge* v. *Smith*, Lord Chief Juſtice *Eyre* does throw out ſome doubts reſpecting the effect of paying money into Court, but my brothers *Heath* and *Rooke* were of opinion that it amounted to ſuch an admiſſion of the validity of the bill there declared upon as to preclude the neceſſity of proving the handwriting of the drawer. It is alſo obſervable, that in the caſe of *Ribbans* v. *Crickett*, which was poſterior to that of *Gutteridge* v. *Smith*, Lord Chief Juſtice *Eyre* in giving the opinion of the Court that money paid into Court could not be applied to an illegal demand, does admit that it amounts to an acknowledgment of any legal demand which according to the nature of the declaration the Plaintiff could have on the Defendant. Then without carrying the effect of payment of money into Court to the extravagant length which has been objected to, we are of opinion that ſuch a payment on the whole declaration, is an admiſſion of a contract on every count, in every tranſaction upon which ſuch a contract can ariſe. Let us however conſider whether the Defendant had ſufficient notice of the tranſaction for which the action was brought: for certainly we would not ſuffer him to be entrapped. Here the declaration was for goods ſold and delivered, and for money had and received: and it may be ſaid that it does not ſpecify the tranſaction in queſtion. But it may be obſerved, that by the modern practice of the Court, if the Defendant be at a loſs to aſcertain the cauſe of the Plaintiff's demand, he may apply for a bill of particulars. The Defendant here muſt have known that he had made no contract with the Plaintiff except what might ariſe out of the tranſaction relating to the ſkins. If he had applied for a bill of particulars he would have been informed that the Plaintiff meant to charge for the value of the ſkins not ſold, and the money received on account of that which was ſold. But he choſe to pay money into Court generally. If therefore at the trial any evidence were given from which a contract under any circumſtances might ariſe, it was competent to the Plaintiff to inſiſt that the Defendant had admitted ſuch a contract. I mean therefore to be underſtood to ſay, that although an action of trover cannot at the option of the Plaintiff only be converted into an action for goods ſold and delivered, yet that an action for goods in the cuſtody of the Defendant, may by contract be converted into an action for goods ſold and delivered: and that under the circumſtances of this caſe it was competent to the Plaintiff to give in evidence the payment of money into Court by the Defendant, as evidence that the tranſaction between the parties had been converted into a contract; which reduced the diſpute to a mere queſtion, whether ſufficient had been paid to cover the value of the ſkins unſold and the money received upon that which had been ſold. We are therefore of opinion that in this caſe there ought not to be a nonſuit.

Per Curiam, Rule diſcharged (*a*).

CATOR *v.* HOSTE.

Nov. 24th.

THIS was an application calling on the Plaintiff to ſhew cauſe why the bond and warrant of attorney, and all other ſecurities of an annuity granted by the Defendant to the Plaintiff ſhould not be delivered up to be cancelled, and why a ſum of money levied under an execution in this cauſe ſhould not be reſtored to the Plaintiff, and all further proceedings be ſtayed. The objection to the annuity aroſe from the mode in which an agreement for a power of redemption had been memorialized. From the affidavits in ſupport of the application it appeared that the annuity had been

At the time of executing an annuity deed, one *R. W.* the agent of *J. C.* the grantee entered into an agreement for redemption, beginning thus, "Memorandum, I undertake and agree," *&c.* and concluding, "Witneſs my hand, *R. W.* agent for *J. C.*" The memorial ſtated that *J. C.* entered into the agreement by *R. W.* his agent, and that it was witneſſed by *R. W.* Held that the memorandum was ſufficient.

(*a*) So if a Plaintiff declare againſt a carrier upon a contract to carry certain goods ſafely, and the carrier pay 5*l.* into Court, he will not be at liberty to give in evidence a notice by which he declares that he will not be liable for any loſs beyond 5*l.*, for by paying money into Court he has admitted the contract as ſtated, and ſhall not be at liberty to ſet up any exception to it, but muſt pay ſo much as the damage ſuſtained by the Plaintiff actually amounts to. *Yate* v. *William*, 2 *Eaſt.* 128.

purchaſed and the conſideration money paid by one *R. Woodgate* as agent for the Plaintiff at the time of the execution of the ſecurities by the Defendant, *Woodgate* alone being preſent and atteſting the deeds, and that an agreement was entered into at that period in the following terms: "Memorandum, I undertake and agree that in caſe the ſaid *D. Hoſte* of, &c. ſhall be deſirous of repurchaſing the annuity granted by him for his life to *J. Cator* of, &c." (it then proceded to ſet out the terms on which the redemption was to be effected, and concluded); "witneſs my hand this 30th day of *September* 1795. *R. Woodgate*, agent for *J. Cator* Eſquire." The manner in which this clauſe was noticed in the memorial was as follows: "And alſo of a memorandum, bearing date the 30th day of *September* 1795, whereby the ſaid *J. Cator*, by *R. Woodgate* his agent, undertook and agreed, that in caſe the ſaid *D. Hoſte* ſhould be deſirous of repurchaſing the annuity," &c. (ſetting out the terms as in the memorandum, and concluding) "or the ſaid memorandum was to ſuch purport or effect; and which ſaid memorandum is witneſſed by the ſaid *R. Woodgate*." Hence it was objected that the agreement was not truly ſet forth in the memorial, it being there deſcribed to be an agreement and undertaking by the Plaintiff, whereas it was an agreement and undertaking by *R. Woodgate*, and though ſaid to be witneſſed by him, was in fact ſigned by him not as a witneſs but as the contracting party.

Beſt Serjt. now ſhewed cauſe and argued that the agreement was in ſubſtance truly memorialized, inaſmuch as *Woodgate*, though the contracting party, contracted on the behalf of his principal, not on his own behalf; and that it was not neceſſary that the agreement ſhould have been witneſſed at all.

Praed Serjt. in ſupport of the application contended, that it was not ſufficient to ſtate the ſubſtance of the agreement in the memorial, but that the form alſo muſt be purſued; that it had been conſidered by the Court that the object of the annuity act was to prevent men from entering into ſuch improvident engagements, and therefore was conſtrued ſtrictly in ſupport of applications like the preſent, *Ex parte Anſell*, *ante*, vol. 1. p. 64.; that in this caſe *Woodgate* and not *Cator* was the contracting party, the grantor poſſibly having preferred the undertaking of the former; that the true ſtatement of mere formal matters had been required by the Courts, as for inſtance the preciſe manner in which the conſideration money had been paid (*a*), and the preciſe hand by which it had been paid (*b*).

Lord ALVANLEY Ch. J. I do not think the objection to this annuity can poſſibly prevail, notwithſtanding the rigorous extent to which the proviſions of the annuity act have been carried. Whatever my opinion might have been originally, I muſt now acquieſce in the determination that the hand by which the conſideration money is paid muſt be ſtated. But that ſtatement is not mere matter of form, for the reaſon upon which that deciſion proceeded was that the Court, by having before them all the *dramatis perſonæ*, might be able to aſcertain all the particulars of the tranſaction. Indeed according to the letter of the act, ſuch a ſtatement does not appear neceſſary. Undoubtedly a clauſe of redemption muſt be truly ſtated, becauſe it is part of the conſideration of the annuity. But it does appear to me that the memorial in the preſent caſe has very truly ſtated the agreement for redemption. What was the preſent tranſaction? *Woodgate* as agent for *Cator* ſigns the contract for the annuity, and then enters into the agreement for the repurchaſe of the annuity on which the preſent queſtion turns. He muſt therefore be taken to have entered into the agreement as agent only for *Cator*, and the agreement muſt be conſidered as ſubſtantially *Cator*'s and not *Woodgate*'s. The former only is liable on this undertaking and not the latter. With reſpect to the obſervation that it is ſaid to be ſigned by *Woodgate* as a witneſs, when in fact it was ſigned by him as an agent, the anſwer is that it was not neceſſary that it ſhould be witneſſed.

HEATH and ROOKE Js. expreſſed themſelves of the ſame opinion.

CHAMBRE J. The names of the witneſſes are required to be ſtated, in order that evidence of the tranſaction may at any time be obtained. But that reaſon does not apply to this caſe, where the only perſon preſent is ſtated in the memorial, but whether preſent as witneſs or agent is the ſingle point in diſpute. If indeed this mode of memorialiſing the agreement had a tendency to miſlead, that might be a ground for the application, but we

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(*a*) *Rumball* v. *Murray*, 3 *Term Rep*. 298. See alſo *Ex parte Fallon et Ux*. 5 *Term Rep*. 283. and *Kelſe* v. *Ambroſſe*, 7 *Term Rep*. 551. and *Glaſſe* v. *Mount*, *ib*. 390. But this rule applies to the *deed* only, not to the memorial, *per Eyre*, Ch. J. *Ex parte Anſell*, *ante*, vol. 1. p. 63. note *a*.

(*b*) *Dalmer* v. *Barnard*, 7 *Term Rep*. 248.

ought to extend the rules adopted with reſpect to memorials no further than juſtice requires.

Rule diſcharged.

Nov. 24th.

WHEELER Demandant, HILL Tenant, and HESELTINE and Others Vouchees.

Amendment of a recovery by inſerting a new pariſh in the writ of entry, on affidavit of the original intent of the parties to include all their property within the county, and of the aſſent of all perſons intereſted at the time of the amendment.

WILLIAMS Serjt. moved to amend a common recovery by inſerting in the writ of entry "the pariſh of *Charles*." The recovery was ſuffered in *Hilary* Term, 25 *Geo.* 3. of lands in the pariſh of *St. Andrew*, in the county of *Devon*, by the tenant in tail, with reverſion to himſelf in fee. The deeds to lead the uſes conveyed "all thoſe two fields or cloſes of land called '*Sherwell's Fields*,' in the pariſh of *St. Andrew* in *Plymouth*, in the county of *Devon*, and all other the hereditaments wherein *M. T.* was ſeiſed, of any eſtate of inheritance in *Plymouth* or elſewhere in the county of *Devon*." After the recovery had been ſuffered it was diſcovered that the cloſes called "*Sherwell's Fields*" were ſituate in the pariſh of *Charles* in *Plymouth*, and not in *St. Andrew*. It was now ſtated by affidavit to have been the intention of all the parties to the recovery that all the eſtates of *M. T.* ſituate in the county of *Devon*, ſhould be included therein, and that all the iſſue of the tenant in tail were of age and conſented to the preſent application. He cited *Watſon* v. *Cox*, 2 *Bl.* 1065.

Lord ALVANLEY Ch. J. heſitated much in acceding to the application, and ſaid that he would not have concurred in the amendment if all the parties whoſe intereſts might be affected had not aſſented to it.

Per Curiam, Amendment allowed (*a*).

(*a*) Vid. *Croſs* v. *Pead*, *ante*, vol. 1. p. 137. and the notes to that caſe.

Stovin One, *&c.* *v.* Perring and Another, Sheriffs of *London*.

Nov. 24th.

In an action againſt the Sheriff for an eſcape on meſne proceſs, it is ſufficient to aver that the Sheriff had not the body at the return of the writ, without negativing the appearance of the party or his putting in bail.

If the writ iſſue from *C. B.* and the declaration for an eſcape aver that the Defendant "had not the body before our ſaid Lord the King" on the return day, it is bad on ſpecial demurrer.

Action on the caſe.

The firſt count of the declaration ſtated that one *John Pugh* being indebted to the Plaintiff for work and labour, the Plaintiff ſued and proſecuted out of *the Court of our Lord the King of Common Bench*, a writ of attachment of privilege, directed to the Defendants as Sheriffs of *London*, whereby they were commanded that they ſhould attach the ſaid *John Pugh* and have him before *the King's Juſtices at Weſtminſter* on *Saturday* next after eight days of *St. Hilary*, to anſwer, *&c.*; that the writ was duly indorſed for bail and delivered to the Defendants, who did arreſt the ſaid *John Pugh*, but that the Defendants afterwards ſuffered the ſaid *John* to eſcape; and that the Defendants ſo being Sheriffs of *London* as aforeſaid had not the body of the ſaid *John before our ſaid Lord the King* upon or at the day mentioned in the ſaid writ, and ſo thereby appointed for the return thereof as aforeſaid, according to the exigency of the ſaid writ, and the rules and practice *of the ſaid Court of our ſaid Lord the King of Common Bench* on that behalf.

The ſecond count, after ſtating the delivery of the writ to the Defendants as in the firſt count, averred that the ſaid *John Pugh* after ſuch delivery, and before the return of the ſaid writ, to wit, on, *&c.* and on divers other days and times between that day and the return day of the writ, was within the bailiwick of the Defendants, and might and could at any or either of thoſe days and times have been arreſted. Yet that the Defendants did not, nor would at any or either of thoſe days or times, or at any other time whatſoever before the return of the laſt mentioned writ, take or arreſt the ſaid *John* at the ſuit of the Plaintiff, under and by virtue of the ſaid laſt-mentioned writ, but wholly refuſed and neglected ſo to do, neither had they the body of the ſaid *John* before the Juſtices of the ſaid Lord the King of the *Common Bench* upon or at the day mentioned in the ſaid laſt-mentioned writ, and thereby appointed for the return thereof according to the exigency of the ſaid laſt-mentioned writ, and the rules and practice of the ſaid Court of the ſaid Lord the King of *Common Bench* in that behalf, but ſo to do wholly neglected and omitted, and therein failed and made default, to wit, at, *&c.* by means whereof the Plaintiff was delayed in the recovery of his debt.

To this declaration there was a ſpecial demurrer aſſigning for cauſes " that it is not ſtated or alleged in or by the ſaid firſt count of the ſaid declaration, that the ſaid Defendants as ſuch Sheriffs of *London* had not the body of the ſaid *John Pugh* before our ſaid Lord the King's Juſtices at *Weſtminſter* at the return of the ſaid writ in that count mentioned, but only that they the ſaid Defendants, ſo being Sheriffs of *London* as aforeſaid, had not the body of the ſaid *John* before our ſaid Lord the King upon or at the day mentioned in the ſaid writ in that count mentioned, which, inaſmuch as the ſaid writ in that count mentioned was iſſued out of and returnable in the Court of our Lord the King of the *Common Bench* at *Weſtminſter*, they were not commanded or requeſted to do. And alſo that it is not ſtated in and by the ſaid firſt count, nor in any other part of the ſaid declaration, that the ſaid *John Pugh* did not appear or put in bail to the ſaid writ in that firſt count mentioned in the ſaid Court of our Lord the King of the *Common Bench* at *Weſtminſter* at the return of the ſaid writ, according to the exigency thereof." And as to the laſt count " that it is not in or by that count of the ſaid declaration, nor in any other part of the ſaid declaration, ſtated or alleged that the ſaid *John Pugh* did not appear or put in bail to the ſaid writ, in the ſaid laſt count mentioned, in the ſaid Court of our Lord the King of the *Common Bench* at *Weſtminſter* on the return of the ſaid writ, according to the exigency thereof. And alſo that the ſaid declaration is in various other reſpects uncertain, inſufficient, and informal," *&c.*

Vaughan Serjt. having admitted, upon a queſtion being put to him by the Court, that the firſt count was not maintainable,

Lens Serjt. was now called upon to ſupport the objection to the ſecond count. He contended that it was not ſufficient for the Plaintiff to allege that the Sheriff had not the body at the return of the writ, without negativing that the party appeared or put in bail, for that he might have voluntarily ſurrendered himſelf and put in bail without any arreſt; and he cited *Hawkins* v. *Plomer*, 2 *Bl.* 1048. to ſhew that it is ſufficient if the Defendant appear at the return of the writ, and that in actions for eſcape on meſne proceſs the writ ſhall ſurmiſe that *ad largum ire permiſit et non* *comperuit ad diem*, though on proceſs in execution *ad largum ire permiſit*, is quite ſufficient.

Vaughan Serjt. for the Plaintiff inſiſted that if the party appear and put in bail, it is a compliance with the writ and will negative the allegation that the Sheriff had not the body; for that if the Sheriff be ruled to bring in the body, putting in good bail ſatisfies the rule, *Wolfe* v. *Collingwood*, 1 *Wilſ.* 262. That with reſpect to the diſtinction between actions on meſne proceſs and on proceſs of execution, though it be not ſufficient in the former caſe to ſay, *ad largum ire permiſit*, yet it is not neceſſary to allege both that the Sheriff had not the body, and that the party did not appear at the day, which are ſynonymous allegations, though indeed it be neceſſary that one of them ſhould be added; that the command of the writ is that the Sheriff have the body to anſwer, &c. and that it is therefore ſufficient to allege a breach in the words of the writ.

Lord ALVANLEY Ch. J. I can entertain no doubt that the Plaintiff has alleged a ſufficient breach of duty in the Sheriff to entitle himſelf to an action for the damage which has enſued. If the party had appeared at the return of the writ, the Sheriff would have had the body.

HEATH and ROOKE Js. concurred.

CHAMBRE J. It ſeems to me to be ſufficient in this caſe to follow the language of the writ; though I confeſs that I do not like to depart from the eſtabliſhed forms of pleading (*a*) for which there often are reaſons which do not at firſt occur. In the preſent inſtance however it does appear to me that the breach is ſufficiently ſtated.

Judgment for the Plaintiff on the ſecond count.

(*a*) In *Herne's Pleader*, p. 129. there is a precedent of a declaration in caſe for an eſcape, in which the allegation of the debtor's non-appearance on the return day is like the one adopted in the principal caſe, *viz.* " did ſuffer freely to go at large whither he would, and the ſaid *R.* before the ſaid Juſtices of the ſaid King at *Weſtminſter* aforeſaid at the ſaid morrow of All Souls, according to the effect of the ſaid writ, he had not." But in *Toone* v. *Theobald, Lill. Ent.* 60. where the averment is that the Sheriff neglected to have the body on the return day, it is followed by an allegation that the debtor " was not committed to the Marſhal of the *Marſhalſea, nor put in any bail.*" The modern practice is to allege that the debtor did not appear according to the exigency of the writ; which ſingle allegation negatives both his having put in bail, and that the Sheriff had his body. In this form are moſt of the MSS. precedents. See alſo *Wentw. Plead.* v. 8. p. 456; though in the ſame volume, p. 482. there is a precedent ſimilar to the one adopted in the principal caſe.

Nov. 25th.

REDIT Gent. One, &c. v. BROOMHEAD.

An attorney's clerk, though not clerk to the Defendant's attorney, cannot become bail above.

THE bail in this caſe, being about to juſtify, were oppoſed by *Williams* Serjt. on the ground of one of the bail originally put in being clerk to an attorney, in whoſe room one of the now bail had been ſubſtituted, and notice given that the bail thus added would with the other original bail juſtify. He obſerved that the bail put in at firſt being a nullity, becauſe one of them was clerk to an attorney, it was impoſſible to add any bail to what did not exiſt.

Bayley Serjt. *contrà* inſiſted that the bail originally put in not being clerk to the attorney of the Defendant in the action, did not fall within the reaſon of the rule, which had been at firſt adopted with reſpect to attornies only, and ſubſequently extended to their clerks.

But *The Court* (not without much heſitation on the part of Lord *Alvanley* Ch. J.) finding the practice had been uniform (*a*) not to allow attornies clerks to become bail, rejected the bail; and *Heath*, *Rooke*, and *Chambre* Js. expreſſed themſelves clearly of opinion that the rule was a very beneficial one, and had with reaſon been extended to all attornies' clerks.

(*a*) Vid. *Boulogne* v. *Vautrin*, *Doug.* 467. *in notis*. *Laing* v. *Cundall*, 1 *H. Bl.* 76. and *Corniſh* v. *Roſs*, 2 *H. Bl.* 350. Indeed the words of the rule *Mich.* 6 *Geo.* 2. on which the practice is founded, are very ſtrong, *viz.* "no attorney of this or any other court, *or any perſon practiſing as ſuch.*" Where any perſon within the prohibition of this rule is put in as bail, the Plaintiff may take an aſſignment of the bail bond, *Fenton* v. *Ruggles*, *ante*, vol. 1. p. 356. and *Wallace* v. *Arrowſmith*, *ante*, p. 49.

COKER *v.* GUY.

Nov. 26th.

A. being tenant to *B.* under a leaſe containing covenants, by which the former was bound to fetch 75 buſhels of coals from *Poole* yearly, and deliver them at the manſion-houſe of the latter, and alſo to ſupply him with as much good wheat as he ſhould want in his family at five ſhillings *per* buſhel; it was agreed between them that the leaſe ſhould be ſurrendered up, and a new one granted, omitting the above covenants. A new leaſe was accordingly executed, and at the ſame time an agreement was entered into, whereby *A.* agreed with *B.* that he would fetch and bring to the dwelling-houſe of *B.* his heirs and aſſigns 75 buſhels of coals yearly for 12 years (the term of the new leaſe), and yearly ſupply *B.* his heirs and aſſigns, with as much good wheat as he ſhould want in his family at five ſhillings *per* buſhel. *B.* having parted with his reverſion in the farm, and alſo quitted the manſion-houſe in which he reſided at the time when the agreement was made, held that he was not entitled to maintain an action againſt *A.* for refuſing to deliver the wheat at the ſtipulated price; that the agreement being entire, muſt receive one uniform conſtruction, and as it was clearly local in reſpect to the delivery of coals, it could not be deemed perſonal in reſpect to the wheat. Held alſo that no parol evidence could be admitted to explain the agreement, there being no latent ambiguity.

ASSUMPSIT. The firſt count of the declaration ſtated "that heretofore and before the making of the agreement, promiſe, and undertaking hereinafter mentioned, to wit, on the 4th day of *May* 1793, at *Saliſbury*, in the county of *Wilts*, the Defendant became and was tenant to the Plaintiff of a certain meſſuage and farm of the ſaid Plaintiff, in the pariſh of *Handley*, in the county of *Dorſet*, by virtue of a certain leaſe and demiſe thereof then and there made by the ſaid Plaintiff to the ſaid Defendant, for a certain term of years, to wit, for the term of 14 years then next following, wherein the ſaid Defendant amongſt other things covenanted with the ſaid Plaintiff that he the ſaid Defendant, his executors and adminiſtrators, ſhould and would yearly and every year during the continuance of the ſaid leaſe, fetch 75 buſhels of coals from *Poole*, and all the peat, turf, and other fuel which the ſaid Plaintiff ſhould want to make uſe of, and deliver the ſame at his manſion-houſe *gratis*; and alſo ſhould and would during the ſaid term ſupply the ſaid Plaintiff with as much good wheat as he ſhould want to expend in his family at 5*s.* *per* buſhel, and as much good barley and oats as he ſhould want for his horſes, pigs, and dogs at one guinea *per* quarter; that thereupon, afterwards and before the end and expiration of the term of 14 years above mentioned, and during the continuance of the leaſe aforeſaid, to wit, on the 27th day of *May* 1796, at *Saliſbury*, in the county of *Wilts* aforeſaid, it was agreed mutually by and between the ſaid Plaintiff and Defendant, that the leaſe ſo granted as aforeſaid ſhould be ſurrendered up and cancelled, and that the ſaid Plaintiff ſhould grant a new leaſe to the ſaid Defendant for the term of twelve years, to commence from the then preceding 29th day of *September*, and which ſaid new leaſe ſhould not contain any covenant on the part and behalf of the ſaid Defendant, his executors, or adminiſtrators, to fetch yearly and every year during the continuance of the ſaid new leaſe 75 buſhels of coals, &c. (following the words of the former covenant); and that it was then and there further agreed by and between the ſaid Defendant and the ſaid Plaintiff, that the ſaid Defendant and his executors ſhould fetch and bring to the dwelling-houſe of the ſaid Plaintiff, his heirs and aſſigns, 75 buſhels of coals from *Poole* yearly and every year during the term of twelve years from the 29th day of *September* then laſt paſt, and all the peat, turf, and other fuel, and alſo ſupply him with wood for his fencing and hedging his lands *gratis*, when reaſonably required, and alſo permit the ſaid Plaintiff, his heirs and aſſigns to winter two rother beaſts with ſtraw in the backſides or ſtraw bartons, with the milch cows belonging to ſaid Defendant, his executors and adminiſtrators *gratis*, and permit and ſuffer the pigs to go out to ſtubble with the pigs of the ſaid Defendant, his executors and adminiſtrators *gratis;* and alſo yearly and every year during the ſaid term, ſupply the ſaid Plaintiff, his heirs and aſſigns, with ſo much good wheat as he or they ſhould want to expend in his or their family at 5*s.* *per* buſhel, and alſo ſo much good barley and oats as he or they might want for his or their horſes, pigs, and dogs, at 2*s.* 7½*d.* *per* buſhel; and in failure of the performance thereof, or any part thereof, to pay to the ſaid Plaintiff, his heirs and aſſigns, the ſum of 100*l.* in lieu and ſatisfaction thereof; that in conſideration that the Plaintiff promiſed the ſaid Defendant to perform the ſaid agreement in all things on his part to be performed, the Defendant promiſed to perform the ſame in all things on his part to be performed; that afterwards, to wit, on the ſame day and year laſt aforeſaid, at, &c. the ſaid firſt mentioned leaſe was ſurrendered up and cancelled, according to the ſaid agreement; and that afterwards, to wit, on the ſame day and year laſt aforeſaid, at, &c. he the ſaid Plaintiff did execute a new leaſe to the ſaid Defendant, according to the ſaid agreement ſo made as aforeſaid, and did do and perform all things in the ſaid agreement contained on his part and behalf to be done and performed, to wit, at, &c.; yet the Defendant had not yearly from the ſaid 29th of *September* to the ſuing out of the original writ of the Plaintiff, fetched and brought to the dwelling-houſe of the Plaintiff 75 buſhels of coals from *Poole* aforeſaid, &c. (negativing the Defendant's performance of any of the terms of the agreement); by reaſon whereof, and according to the tenor of the ſaid agreement, the ſaid Defendant became liable to pay to the Plaintiff the ſum of 100*l.* when requeſted, &c.

The Defendant pleaded *Non aſſumpſit.*

The cauſe was tried before *Graham* Baron, at the laſt Summer Aſſizes at *Saliſbury*, when it appeared that the firſt leaſe ſtated in the declaration was ſurrendered, and a new one granted in the manner therein mentioned, and that the agreement therein alſo mentioned was executed on the ſame day as the new leaſe; that the Plaintiff at the time when the new leaſe and agreement were executed, was poſſeſſed of two manſion-houſes in the pariſh of *Handley*, one called *Stricklands*, the other called *Williams*'s, in the former of which he then reſided; but that he afterwards ſold *Stricklands*, together with the reverſion in the Defendant's farm, and from that time reſided in *Williams*'s; that from the time when the Plaintiff quitted *Stricklands*, the Defendant had omitted to perform the agreement, and that the action was brought to recover damages for ſuch non-performance. The learned Judge was of opinion that the written agreement was to be conſidered independent of the leaſe, and that although ſuch parts of the agreement as required a local delivery or local performance could not be enforced after the Plaintiff had quitted *Stricklands*, yet that as ſome parts of it did not require ſuch local delivery or performance, the Plaintiff had ſtill a right to inſiſt upon the Defendant's compliance with thoſe parts, though the latter was no longer tenant to the Plaintiff. He therefore directed the Jury to conſider what damage the Plaintiff had ſuſtained by the Defendant's refuſal to ſupply him with a ſack of wheat, which had been demanded, at the price mentioned in the agreement. The Jury found a verdict for the Plaintiff, damages 20 ſhillings.

A rule having been obtained calling on the Plaintiff to ſhew cauſe why this verdict ſhould not be ſet aſide, and a new trial be granted,

Beſt Serjt. ſhewed cauſe. It was agreed between the parties that the covenants of the old leaſe in favour of the landlord ſhould be excepted out of the new leaſe, and the evident reaſon why this was done was, that the landlord being about to quit the premiſes on which he then reſided, wiſhed to make the undertaking of the tenant perſonal to himſelf, and thereby ſecure to himſelf thoſe advantages which would otherwiſe have paſſed to his aſſignee. From the terms of the agreement it appears indeed that ſome of the covenants were only to be performed while the Plaintiff reſided in his then dwelling-houſe; but the ſtipulation reſpecting the wheat is not to be ſo reſtrained; for the agreement is general that the Defendant ſhall ſupply the Plaintiff with ſo much wheat at ſo much *per* quarter, which implies this proviſion, *viz.* if the Plaintiff ſhall demand the ſame of the Defendant, which demand muſt be made at the Defendant's reſidence. Nor is there any reaſon why the tenant ſhould be relieved from ſuch ſtipulation, for he of courſe has had a valuable conſideration for it in the amount of his rent; and if the preſent Plaintiff cannot maintain this action the Defendant will be altogether diſcharged; for whether the Plaintiff or his aſſignee of the reverſion be entitled to the benefit of the agreement, the action muſt be brought in the name of the Plaintiff.

Lens Serjt. *contrà* was ſtopped by the Court.

Lord ALVANLEY Ch. J. I cannot conſtrue this agreement in any other way than as referring to the relation of landlord and tenant ſubſiſting between the parties, and that it was meant to continue between the Plaintiff and Defendant only ſo long as that relation ſhould exiſt between them (*a*). The words "heirs and aſſigns" being introduced throughout clearly ſhew that it could not be intended as a mere perſonal agreement. Indeed many of

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(*a*) But it ſhould ſeem that if the Plaintiff had parted with his intereſt in the lands demiſed to the Defendant, or even with his eſtate in the manſion-houſe called *Stricklands*, but had continued to reſide in the latter ſo as to be capable of deriving a benefit there from the performance of the agreement, he might have maintained his action. For where a parſon covenanted with *R. B.* who was tenant by the curteſy to find a prieſt to perform divine ſervice in the houſe of *R. B.* every *Saturday* in the year during the life of the ſaid *R. B.* and afterwards *R. B.* ſurrendered his eſtate to the reverſioner, and took back a term for years, it was held that the covenant was not extinct, and that *R. B.* might maintain an action for non-performance of the covenant, 6 *H.* 4. 1. 1 *Roll. Ab. Covenant* O. pl. 1. fol. 522. 1 *Bac. Ab. Covenant* G. fo. 540. ed. 1736. 6 *Vin. Ab. Covenant* O. So where the covenant was to perform divine ſervice in the chapel of *D.* not deſcribing it as belonging to the manor, it was held that the heir of the covenantee might maintain the action, though, in conſequence of *meſne* alienations, he was not ſeiſed of the manor in his own right, but in that of his wife, for the covenant being perſonal deſcended upon the heir of the covenantee, and not upon the purchaſer of the manor; but in that caſe it ſeems alſo to have been holden that if the chapel had been deſcribed as belonging to the manor, the heir after alienation could not maintain the action: nor even the alienee (adds *Broke*), as it ſhould ſeem, for he is not privy in blood, 2 *H.* 4. 6 *Bro. Abr.* tit. *Covenant*, pl. 17. *Fitz. Abr.* tit. *Covenant*, pl. 13. But this latter poſition of *Broke* is contradicted by 42 *Ed.* 3. 3. alſo abridged by *Broke*, tit. *Covenant*, pl. 5. There the covenant was to chaunt in the chapel of ſuch a manor for the lords and their ſervants, and it was admitted that the purchaſer of the manor might maintain an action on the covenant, though not privy as heir to the covenantee; for the covenant went with the land.

the covenants are ſuch as could not poſſibly be performed to any given aſſignee of the Plaintiff's living at any diſtance whatſoever from the demiſed premiſes, but only to ſuch aſſignee as ſhould ſucceed to the Plaintiff's dwelling-houſe at *Stricklands*, and ſtand in all reſpects in the ſame relation as the Plaintiff himſelf did at the time the agreement was entered into. It is obſervable alſo that theſe words "heirs and aſſigns" are uſed in the ſtipulation reſpecting the wheat as well as the other ſtipulations, and we muſt give one uniform and entire conſtruction to the agreement, and not hold ſome parts of it to be perſonal and others not ſo. The parol evidence in this caſe cannot vary this conſtruction. I am therefore of opinion that we are bound to conſider the Defendant as having executed this agreement in the capacity of tenant to the perſon who ſhould continue to ſuſtain the character of landlord.

Heath J. I am of the ſame opinion. In the firſt place, it appears to me that no parol evidence can be admitted unleſs there be a latent ambiguity in the agreement itſelf (*a*). It is contended, however, that the agreement itſelf is perſonal; but many of the ſtipulations in the agreement are clearly local, and not to be performed at a diſtance from the premiſes. The covenant to ſerve the Plaintiff's family, muſt mean his family in that place, and not whereſoever they may happen to reſide.

Rooke J. Had this agreement been reverſed in its order, and the ſtipulations reſpecting the wheat been placed at the beginning, there might have been ſome ground for the Plaintiff's argument. But here the agreement begins with a proviſion that the Defendant ſhall bring coals to the Plaintiff's dwelling-houſe, and then goes on to ſtipulate that the Defendant ſhall furniſh fuel and alſo wood for fencing his lands; then follow other proviſions reſpecting the Plaintiff's cattle, and then the ſtipulation to ſupply the Plaintiff with as much wheat as he ſhould want in his family. Now the meaning of the term family muſt be his family reſiding upon the premiſes. Every agreement muſt receive its conſtruction from its own terms, without the introduction of any evidence *dehors* the agreement, unleſs there be ſome latent ambiguity.

Chambre J. If there be any ambiguity reſpecting the particular articles mentioned in this agreement, we muſt look to the whole of the agreement in order to aſcertain the ſenſe of it. It is

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(*a*) *Vide etiam Preſton* v. *Merceau*, 2 *Bl.* 1249.

admitted that ſome of the articles can only relate to the ſituation of landlord and tenant; but it is concluded that the ſtipulation reſpecting the wheat is to be ſeparated from the reſt, and to be conſtrued as a perſonal agreement: but I find nothing in the language of the agreement which calls upon us to divide any part of it from the reſt. The heirs and aſſigns mentioned in the agreement muſt either mean the heirs and aſſigns who ſhould be entitled to the eſtate in leaſe to the Defendant, or the heirs and aſſigns who ſhould be entitled to the houſe in which the Plaintiff reſided: but in either of theſe caſes the preſent Plaintiff would be precluded from maintaining his action.

Rule abſolute.

Nov. 26th.

SLADE et Ux. Tenants *v.* DOWLAND Demandant; in Falſe Judgment.

If a demandant in a writ of right count upon the ſeiſin of his anceſtor *in dominico ſuo ut de feodo*, omitting *et de jure*, it ſeems to be bad.

If the demandant in deducing his title through a female, deſcribe her as ſiſter *and heir* of *J. S.* and it appear upon the face of the count that *J. S.* left a ſon who ſurvived his aunt, it is fatal; although it alſo appear that upon failure of iſſue of the ſon, the iſſue of the ſiſter of *J. S.* became his heirs.

WRIT of falſe judgment directed to the Sheriff of *Dorſetſhire*, commanding him to go to the Court of the Manor and Foreſt Manor of *Gillingham*, and there cauſe to be recorded a plaint between the Plaintiffs and the Defendant of a plea of land, wherein the Plaintiffs complained that falſe judgment had been given. The Sheriff returned that he had recorded the plaint and ſet out the proceedings, *viz.* a writ of right cloſe; and the count founded thereon, which was as follows: "*Thomas Dowland* by *Auguſtin John Mayhew* his attorney, demands againſt *William Slade* and *Elizabeth* his wife, 18 acres of land, 18 acres of meadow, 18 acres of paſture, and 18 acres of furze and heath, with the appurtenances ſituate, lying and being in the tithing of *Bourton*, in the manor of *Gillingham*, in the county of *Dorſet*, and within the juriſdiction of this Court, and whereof he ſays that *Thomas Gamlyn* was ſeiſed in his demeſne as of fee, according to the cuſtom of the manor aforeſaid in the time of peace, in the time of the Lord *George* the ſecond, late King of *Great Britain*, &c. and within ſixty years now laſt paſt by taking the eſplees thereof to the value, &c. and died thereof ſeiſed, leaving one *Elizabeth* his wife him ſurviving, and from the ſaid *Thomas Gamlyn* the right to the ſaid tenements, with the appurtenances, deſcended and came to one *William Gamlyn*, as brother and heir of the ſaid *Thomas Gamlyn*, ſubject to the

1801.

SLADE et Ux. *v.* DOWLAND; in Falſe Judgment.

the eſtate of free bench of the ſaid *Elizabeth* therein, according to the cuſtom of the manor aforeſaid, and from the ſame *William Gamlyn* the right to the ſaid tenements, with the appurtenances, ſubject to the ſaid eſtate of the ſaid *Elizabeth Gamlyn*, deſcended and came to one *Hannah Dowland*, as eldeſt couſin and heir of the ſaid *William Gamlyn*, according to the cuſtom of the ſaid manor, that is to ſay, as eldeſt daughter and heir of *Hannah Ball*, who was the only ſiſter *and heir* of one other *Thomas Gamlyn*, who was the father as well of the ſaid firſt mentioned *Thomas Gamlyn* as of the ſaid *William Gamlyn*, which ſaid *Elizabeth Gamlyn* died in the lifetime of the ſaid *Hannah Dowland;* and from the ſaid *Hannah Dowland* the right to the ſaid tenements, with the appurtenances, deſcended and came to one *Thomas Dowland*, as ſon and heir of the ſaid *Hannah Dowland;* and from the ſaid *Thomas Dowland*, the ſon and heir of the ſaid *Hannah Dowland*, the right to the ſaid tenements, with the appurtenances, deſcended and came to the ſaid *Thomas Dowland* the now demandant, as ſon and heir of the ſaid *Thomas Dowland*, the ſon and heir of the ſaid *Hannah Dowland*, and that this is his right, he the ſaid *Thomas Dowland* the now demandant offers," *&c.*

Several imparlances followed at the prayer of the tenants, and then a general demurrer; after which other imparlances at the prayer of the demandant, and a joinder in demurrer. Then came a judgment for default of the tenant's appearance, that the premiſes demanded ſhould be taken into the hands of the lord of the manor; and a precept to the bailiff of the manor to take the ſame into the hands of the lord, and to make known the day of the caption at the next court, and ſummon the tenants to hear the judgment: at the next court the bailiff returned that the precept came to his hands too late for him to execute it before the next court; and therefore the ſame judgment was given, and precept awarded as before. At the next court the tenants again made default, and the bailiff returned that he had taken the premiſes into the hands of the lord, and that he had ſummoned the tenants to hear the judgment; whereupon judgment was given that the Demandant ſhould recover his ſeiſin of the tenements, with the appurtenances, againſt the tenants; and the demandant prayed a precept to the bailiff to cauſe him to have his full ſeiſin thereof, which was granted, and at the following court the bailiff returned that he had cauſed the demandant to have full ſeiſin. Upon this record the

preſent

1801.

Slade et Ux. *v.* Dowland; in Falſe Judgment.

preſent Plaintiffs aſſigned errors thus: "And hereupon the ſaid *William Slade* and *Elizabeth* his wife ſay, that the record aforeſaid is vicious and in many reſpects defective, and that falſe judgment is given againſt them in the proceedings aforeſaid in many inſtances, that is to ſay, in this, that is to ſay, that no ſeiſin *of right* of the premiſes in the ſaid count mentioned, is in the ſaid count alleged and averred in *Thomas Gamlyn*, who is therein alleged to have been laſt ſeiſed, and from whom the ſaid *Thomas Dowland* deduces his title, and that the right is in that count alleged to have deſcended to the ſeveral perſons therein named in ſucceſſion from the ſaid *Thomas Gamlyn*, who for any thing which appears in the ſaid count, had no right, and that the title is attempted to be deduced to the ſaid *Thomas Dowland* from an anceſtor who is not alleged to have any right, but for any thing which in the ſaid count appears might have been ſeiſed of wrong, and the right have been in thoſe who had been ſeiſed of and held the ſame premiſes ſince the death of the ſaid *Thomas Gamlyn*, and that the right is ſtated to deſcend from one who no right had, and that the root of the ſaid *Thomas Dowland*'s title is erroneouſly, imperfectly, and defectively alleged; and alſo in this, that ſuppoſing the ſaid *Thomas Gamlyn* the laſt ſeiſed to have had any right, no right is deduced from the ſaid *Thomas Gamlyn* to the ſaid *Thomas Dowland*, inaſmuch as the ſaid *Hannah Dowland* is in the ſaid count alleged to be the heir of the ſaid *William Gamlyn*, and the right to the premiſes in the ſaid count mentioned to have deſcended to the ſaid *Hannah Dowland* as the heir of *Hannah Ball*, which ſaid *Hannah Ball* muſt therefore have died before the ſaid *William Gamlyn*, or the right have deſcended from the ſaid *William Gamlyn* immediately to her the ſaid *Hannah Dowland*, and yet the ſaid *Hannah Ball* is in the ſaid count ſtated to have been the ſiſter and heir of *Thomas Gamlyn* the father, who muſt therefore have died in the lifetime of the ſaid *Hannah Ball*, and to which ſaid *Thomas Gamlyn* the father, *William Gamlyn* his ſon who ſurvived the ſaid *Hannah Ball* muſt have been heir, and to which ſaid *Thomas Gamlyn* the father *Hannah Ball* never could have been heir, if it be true as is in the ſaid count alleged, that the ſaid *Hannah Dowland* was heir to *William Gamlyn* at the time of his death, and that the right deſcended immediately from him to her; and alſo in this, that no cuſtom of the ſaid manor is any where alleged, whereby it appears that eldeſt daughters and eldeſt female couſins are entitled to be heirs alone, and excluſively of their younger ſiſters; and alſo in this, that judgment in the plea aforeſaid is given for the ſaid *Thomas Dowland* againſt the ſaid *William Slade* and *Elizabeth* his wife, when by the law of the land judgment in the plea aforeſaid ought to have been given for the ſaid *William Slade* and *Elizabeth* his wife againſt the ſaid *Thomas Dowland*; and alſo in this, that judgment is given in the plea aforeſaid without any regard to the matter of law before the court on the proceedings, by the demurrer to the ſaid count and joinder thereto; and ſo the ſaid *William Slade* and *Elizabeth* his wife ſay, that in the ſaid court of the ſaid manor falſe judgment hath in divers inſtances been given againſt them upon the proceedings aforeſaid, and they pray that the ſaid judgment for the ſaid defects, and for others in the ſaid record appearing, may be reverſed, annulled, and utterly made void, as being falſe and erroneous, and that the ſaid *William Slade* and *Elizabeth* his wife may be reſtored to every thing which they have loſt on occaſion of the ſaid judgment, and that the ſaid Juſtices here may proceed to the examination of the ſaid premiſes." The Defendant joined in error thus: "And the ſaid *Thomas Dowland* ſays, that the judgment aforeſaid ought not to be reverſed, neither ought the ſaid *William Slade* and *Elizabeth* his wife to be reſtored to any thing which they may have loſt thereby, becauſe he ſays that in the record aforeſaid there is not any error, nor is any falſe judgment given in the ſaid court of the ſaid manor and foreſt manor, upon or in any of the proceedings aforeſaid; and this the ſaid *Thomas Dowland* is ready to verify, and he prays that the Court here may proceed to the examination of the premiſes aforeſaid, and that the judgment aforeſaid may be in all things affirmed, and adjudged good and ſufficient to remain in its full force."

The caſe was argued on the laſt day of laſt *Trinity* Term; when *Williams* Serjt. for the Demandant was deſired by the Court to begin. With reſpect to the firſt objection it is ſufficient to ſtate in the count that the party was ſeiſed in his demeſne as of fee, without adding the words "and of right." Every ſeiſin in fee implies a right to that ſeiſin; and the court will not intend that the party came to his eſtate by diſſeiſin. It is enough if it appear that the anceſtor of the demandant was actually ſeiſed in fee ſimple, that being the only eſtate which can be recovered in a writ of right, *Fitz. N. B.* 1. 5. *Dally* v. *King*, 1 *H. Bl.* 1. Now in this caſe the demandant has alleged that his anceſtor was ſeiſed in his demeſne as of fee; which is a more apt way of pleading in the caſe of an eſtate in poſſeſſion than to ſay, "as of fee and right," which rather applies to an eſtate in reverſion. Thus in *Wroteſley* v. *Adams*, *Plowd.* 187. *a.* the eſtate in fee ſimple in poſſeſſion is deſcribed *in dominico ſuo ut de feodo*, but the fee ſimple expectant on an eſtate for years *ut de feodo et jure*, fo. 187. *b.*, and this diſtinction was approved by the Court, fo. 191. *a.* If however it be contended that the ſeiſin in this caſe may have been obtained by wrong, it may be anſwered that in ſome caſes ſuch a ſeiſin may be ſufficient to maintain a writ of right, as appears from *Co. Litt.* 280. *b.* 281. *a.*; and if there be any caſe in which ſuch a ſeiſin will ſupport the action, it cannot be eſſential to ſtate that the ſeiſin was of right. But independent of general reaſoning, this mode of pleading is ſupported by precedents. In *Raſtal's Entr.* title *Falſe Judgment*, pl. 9. fo. 323. *b.* ed. 1566. the count runs thus: *Et unde dicunt quod ipſimet fuerunt ſeiſiti de meſuagiis terris & prædictis cum pertinentiis in dominico ſuo ut de feodo tempore pacis tempore Domini Regis nunc capiendo*, &c. In *Raſtal Ent.* tit. *Formedon* in Remainder (*a*), pl. 3. fo. 347. *b.* the words *de jure* are alſo omitted, and ſo in the bar to a count in a writ of right cloſe, *Co. Entr.* tit. *Falſe Judgment*, pl. 2. fo. 306. *b.* 2dly, With reſpect to the repugnancy in deducing the title, the introduction of the word "heir" in deſcribing *Hannah Ball*, muſt be taken to have no other effect than to point out the relationſhip in which ſhe ſtood to *Thomas Gamlyn* the father. It would not have been ſufficient to have deſcribed her as eldeſt ſiſter, ſince that deſcription would not have excluded the exiſtence of a brother. But the word "heir" imports that the perſon to whom it is applied is the perſon through whom the ſucceſſion to the eſtate is derived; and not that ſuch perſon ever ſtood in the ſituation to claim the eſtate herſelf as having ſurvived *Thomas Gamlyn* to whom ſhe is deſcribed as heir. In *Hernes' Pleader*, tit. *Formedon* in Reverter, fo. 501. *b.* ed. 1657, there is a precedent to which the ſame objection would have applied. There *Richard* the demandant makes title to the land as the right heir of *E. F.* the donor thus: "and from the ſame *S.* and *A.* (the donees), for that they died without heirs of their bodies begotten, the right reverted by form, *&c.* to the ſame

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(*a*) There are alſo three precedents in *Co. Ent.* tit. *Formedon*, *viz.* fo. 328. *b.* pl. 14. 338. *b.* pl. 15. and 340. *b.* pl. 16. where the words *de jure* are altogether omitted.

Richard, who now demands as couſin and heir of the ſaid *E. F.* to wit, ſon of *S. B.*, ſon and heir of *L. F.*, ſon and heir of *W. F.*, brother and heir of the ſaid *E. F.* the donor, and which after the death," &c. *Richard* the demandant therefore was heir to the donor at the time of the death of the donees without iſſue, and conſequently *S. B. L. F.* and *W. F.* through whom he claimed, muſt all have been dead at that time. In this indeed there is no repugnancy. But the plea ſhews that *J.* and *A.* the donees were the daughters of the donor: if therefore *W. F.* the donor's brother died before them, he could never have been heir to the donor. This is preciſely the ſame objection as that which is now raiſed: and had it been conſidered of importance would probably have been taken advantage of in the former caſe. In the caſe of a lineal deſcent it may be incorrect to deſcribe a perſon as heir to another who ſurvived him; but in deſcribing a collateral deſcent, the word "heir" is uſed to ſhew that the anceſtor to whom it is applied would, if living, have been heir to the perſon laſt ſeiſed. If however it ſhould be thought that the objection has any weight, yet as *Hannah Dowland* is properly deſcribed as couſin and heir of *William Gamlyn*, and the ſteps by which her title is deduced, are ſtated under a *ſcilicet*, the Court may reject the latter part as unneceſſary (*a*), or conſider the word "heir" as ſurpluſage. Indeed the proceedings in a Court of this deſcription are not to be canvaſſed with the ſame accuracy as the judgments of the Courts in *Weſtminſter Hall*, as appears from *Aſh* v. *Rogle and the Dean and Chapter of Saint Paul's*, 1 *Vern.* 367. *Show. Par. Caſ.* 67. where a common recovery in a Court Baron was ſupported, though erroneous, not merely on the ground of its being a common aſſurance, but becauſe it was ſuffered in a Court Baron.

[The counſel for the Plaintiff intimated that he ſhould not inſiſt upon the third objection, and the Court obſerved that there was nothing in it.]

Lens Serjt. for the Plaintiff. Undoubtedly theſe objections are very nice. But the Court muſt conſider them as if taken upon a ſpecial demurrer: for as there has been a general demurrer in the Court below to which the ſtatute reſpecting ſpecial demurrers does not extend, the aſſignments of errors upon the writ of falſe judgment

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(*a*) But it ſeems that it would not have been ſufficient to deſcribe the Demandant as couſin and heir, without ſhewing in what manner ſhe was heir. See 1 *Iſſ.* pl. 15. where this doctrine was laid down in a writ of *mordanceſter*.

ment are in the nature of ſpecial cauſes of demurrer. 1ſt, It is not ſufficient in a writ of right for the demandant to ſet forth a ſeiſin only; he muſt ſhew that he has the mere right. The iſſue is not taken upon the ſeiſin but upon the right; and unleſs an allegation of the right be made no iſſue can be taken. The paſſages cited from *Fitzherbert* only ſhew under what circumſtances a writ of right may be maintained; but do not point out what particular allegations are neceſſary to be made in the count. So the caſe of *Dally* v. *King* only lays down that an allegation of an actual ſeiſin is neceſſary, but does not ſay whether or not that ſeiſin muſt be alleged to be of right. With reſpect to the caſe of *Wroteſley* v. *Adams*, though it was there ſaid to be correct to deſcribe a ſeiſin in reverſion "as of fee and right," yet it was not there holden that in a writ of right it would not be neceſſary to deſcribe a ſeiſin in poſſeſſion as "of right" alſo: that was not a caſe of a writ of right; and the diſtinction there taken was between a ſeiſin *in demeſne as of fee*, and a ſeiſin *as of fee and right*, the former of which was thought rather to apply to a ſeiſin in poſſeſſion on account of the word "demeſne," and the latter to a ſeiſin in reverſion. As to the paſſage in *Co. Litt.*, though it be true that a ſeiſin commencing by diſſeiſin may in ſome caſes be ſufficient to maintain a writ of right, becauſe the tenant may be precluded from diſputing it, yet it by no means follows that ſuch a ſeiſin muſt not be alleged in the count to be a ſeiſin of right. The entry in *Raſtal*, tit. *Falſe Judgment*, pl. 9. is indeed an authority in ſupport of this count; but in that caſe as the parties joined iſſue on the fact, the objection could not ariſe; beſides which it may be obſerved, that although the words "*de jure*" are omitted in the deſcription of the ſeiſin, the demandant at the beginning of the count claims the eſtate "as his right and inheritance," which in this caſe the demandant has omitted to do. As to the other entries cited from *Raſtal*, tit. *Formedon*, and *Co. Entr.* tit. *Falſe Judgment*, it may be obſerved, that the former is no authority in a writ of right, and that the omiſſion of the words "*de jure*" in the latter was not in the count but in the bar (*a*). With the exception of the precedent in *Raſtal*, tit. *Falſe*

(*a*) Indeed in *Formedon* the general iſſue is not joined upon the mere right, as in a writ of right, but upon the gift of the donor. For the eſtate demanded and recovered in *Formedon* is not the mere right, *i. e.* the fee ſimple, but an eſtate tail. See *Booth* on Real Actions, fo. 88. See the form of the general iſſue *non dedit*, *Co. Entr.* tit. *Formedon*, pl. 5. 14. 16. fo. 322. *b.* 329. *b.* 341. *a.* *Raſt. Entr.* tit. *Formedon*, pl. 5. 14. 16. fo. 322. *b.* 329. *b.* 341. *a.* *Raſtal. Entr.* tit. *Formedon* in Remainder, pl. 1, 2. fo. 347. tit. *Reſceit in Formedon*, pl. 3. fo. 349. *a.*

Judgment, pl. 9. the entries will be found univerſally to have the words "*de feodo et jure.*" To this effect are the entries in *Raſtal*, tit. *Droyt Cloſe*, pl. 1. fo. 233, pl. 5. fo. 234. *b.* ed. 1566, and another in the ſame book, title *Copyhold*, pl. 1. fo. 129. in which laſt caſe it appears to have been thought neceſſary in an action in the manor court in the nature of a writ of right patent, for the copyholder to allege his ſeiſin *in dominico ſuo ut de feodo et jure ad voluntatem domini ſecundum conſuetudinem*, &c. 2dly, If there be any inconſiſtency in the ſtatement of the demandant's title, that part which creates the inconſiſtency, though under a *videlicet*, cannot be rejected, for it is perfectly clear that in a writ of right all allegations of title are material allegations, for the title muſt be regularly ſet out, and proved as laid. Now if any thing appear upon the face of the title which could not by poſſibility be proved, the title becomes defective: and in this caſe had the parties gone to trial, it would have been impoſſible to prove that *Hannah Ball* ever was the heir of *Thomas Gamlyn*. The demandant could not have reſorted to any other mode of deriving his title than that ſet forth upon the record, and by that it appears that *Hannah Ball* died before *William Gamlyn*, who was the heir of *Thomas Gamlyn*.

Williams in reply inſiſted that a writ of falſe judgment could not be conſidered in the nature of a ſpecial demurrer, but was to be compared to a writ of error on which nothing but defects in ſubſtance can be taken advantage of: and that one precedent in point was ſufficient to induce the Court in a cauſe of this ſort to ſupport the judgment given below.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. We are to decide whether any of the errors aſſigned upon this record are fatal; for if any of them prevail judgment muſt be given for the tenant. The errors aſſigned are three in number. The 1ſt objection is, that it is not alleged that *Thomas Gamlyn*, from whom the demandant deduces his title, was ſeiſed in his *demeſne as of fee and right*. Upon this point we do not mean to decide the caſe. But thus far I will ſay, that the objection appears to me fatal, for all the precedents, with the ſingle exception of one cited by my brother *Williams*, contain the above mentioned allegation. It was contended that the word "right" was unneceſſary, except where a reverſion is deſcribed, but that is not the caſe, for an eſtate in poſſeſſion muſt be averred in the ſame manner as an eſtate in reverſion, except that in the latter caſe the

1801.

SLADE et Ux. v. DOWLAND; in Falſe Judgment.

words "in his demeſne" ſhould be omitted. The Court however do not intend to give judgment upon that point, being clearly of opinion that the ſecond objection is fatal. The ſecond objection is, that no right is deduced from *Thomas Gamlyn* to *Thomas Dowland* the demandant, inaſmuch as *Hannah Dowland* is alleged to be the heir of *William Gamlyn*, and the right to have deſcended to the ſaid *Hannah Dowland* as the heir of *Hannah Ball*, which ſaid *Hannah Ball* muſt therefore have died before the ſaid *William Gamlyn*, or *Hannah Dowland* could not have been heir to *William Gamlyn*, or the right have deſcended from *William Gamlyn* immediately to her, and yet *Hannah Ball* is ſtated to have been ſiſter and heir of *Thomas Gamlyn* the father, who muſt therefore have died in her lifetime, and to which *Thomas Gamlyn* the father, *William Gamlyn* the ſon, who ſurvived *Hannah Ball* muſt have been heir, and to which *Thomas Gamlyn* the father *Hannah Ball* never could have been heir, if it be true as alleged that *Hannah Dowland* was heir to *William Gamlyn* at the time of his death, and that the right deſcended immediately from him to her. No doubt there is a complete blunder in the mode of deducing the title; and it is equally clear that if the title be not accurately deduced through a ſeries of anceſtors properly deſcribed, the demandant muſt fail. Now we are of opinion that this being a real action, though originating in a manor court, all the forms of proceeding muſt be as ſtrictly obſerved as if it had been a writ of right originally commenced in this Court, and that the tenant has a right to avail himſelf of any inaccuracy which the demandant may have committed in the courſe of the proceedings. The conſequence is, that there muſt be judgment for the tenant, and that the demandant take nothing by his writ.

Nov. 26th.

DOWSE Gent. Demandant, LLOYD Tenant, and REEVE Vouchee.

Writ of entry and ſubſequent proceedings in a recovery amended by inſerting the words "all and all manner of tithes whatſoever, yearly ariſing, &c. from and out of the ſaid premiſes," on an affidavit ſetting out the vouchee's title to the tithes, and ſtating his intention to have paſſed all his intereſt in the premiſes; the word "hereditaments" being contained in the deed to lead the uſes.

BAYLEY Serjt. moved on the part of the vouchee, to amend the writ of entry and ſubſequent proceedings in a recovery ſuffered in *Michaelmas* Term, 39 *Geo.* 3. by inſerting the words "and all and all manner of tithes whatſoever yearly ariſing, growing, or renewing from and out of the ſaid premiſes." It appeared by the affidavit of the demandant that the grandfather of the vouchee by his will, dated the 14th of *October* 1785, gave and deviſed all and every his freehold manors, meſſuages, farms, lands, tenements, and hereditaments, ſituate in the counties of *Suffolk*, *Kent*, *Berks*, or elſewhere within the kingdom of *Great Britain*, thereinbefore undeviſed, to the uſe of his grandſon *J. P. Reeve* and the heirs of his body; that the ſaid *J. P. Reeve* by bargain and ſale, dated the 26th day of *November* 1798, for the purpoſe of making a tenant to the *præcipe*, conveyed to *J. Lloyd* all that farm called *Grayberry's Farm*, with the ſeveral cloſes, pieces, and parcels of arable, meadow, paſture, and wood land thereto belonging, containing, &c. ſituate in the pariſh of *Eton Bridge*, in the county of *Kent*, and all other the manors, meſſuages, lands, tenements, and *hereditaments* of him the ſaid *J. P. Reeve*, and which were theretofore the eſtate and inheritance of *J. Plumſted*, late of, &c. ſituate in the ſeveral pariſhes thereinbefore mentioned, together with all rights, privileges, advantages, *hereditaments*, and appurtenances belonging or appertaining or to or with the ſame then or at any time theretofore held, uſed, occupied, poſſeſſed, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or as belonging thereunto reſpectively; and all the eſtate, right, title, intereſt, uſe, truſt, poſſeſſion, property, claim, and demand whatſoever of him the ſaid *J. P. Reeve*, of, in, to, or out of the premiſes, to hold to the ſaid *J. Lloyd*, his heirs and aſſigns, for the purpoſe of enabling him to ſuffer a recovery to enure to the uſe of the ſaid *J. P. Reeve*, his heirs and aſſigns; that a recovery was accordingly ſuffered of lands in *Eton Bridge*, but that in the ſaid recovery no mention was made of tithes, the demandant, who was concerned as attorney for *J. P. Reeve* the vouchee, not being appriſed that the ſaid *J. P. Reeve* was entitled to the tithes of the eſtate, but that he had ſince diſcovered that *J. Plumſted* was ſeiſed of the tithes of the eſtate, and that the ſame paſſed by his will to the ſaid *J. P. Reeve* the vouchee. The affidavit further ſtated that it was the intention of the ſaid *J. P. Reeve* and of the demandant, that the ſaid bargain and ſale and recovery ſhould compriſe all the eſtate and intereſt of the ſaid *J. P. Reeve*, in the pariſh of *Eton Bridge*, which had paſſed to him by the will of the ſaid *J. Plumſted* the teſtator.

1801.

DOWSE *v.* REEVE.

Bayley Serjt. relied on a caſe of *Milbanke* v. *Jolliffe*, decided in the Court of Pleas at *Durham*, 23d *July* 1772, with the concurrence of the late Mr. Juſtice *Gould* and Mr. Juſtice *Willes*, who were conſulted upon it (*a*).

The Court, after ſome heſitation on the part of Lord *Alvanley* Ch. J. allowed the amendment.

(*a*) The following is a note of that caſe.

Milbanke v. *Jolliffe*. In the Court of Pleas at *Durham*.

On the 11th of *January* 1704 *Ralph Hedworth* Eſq. by his will deviſed to his ſon *John Hedworth* Eſq. and his heirs, all his manor of *Cheſter* deanery, with the appurtenances, and all his meſſuages, lands, and hereditaments whatſoever in the county of *Durham*, and all other his real eſtates. On the 27th and 28th *Auguſt* 1714, by leaſe and releaſe (on the marriage of *John Hedworth* with *Suſannah Sophia Pelſant*) he conveyed to truſtees all that the manor or lordſhip, or deanery of *Cheſter le Street*, with the appurtenances, and divers lands, *&c.* (as deſcribed), and all other the meſſuages, lands, tenements, and *hereditaments* whatſoever of him the ſaid *John Hedworth* in *Cheſter le Street*, or elſewhere in the county of *Durham*, wherein he had any eſtate of freehold or inheritance, together with all *hereditaments*, rights, members, and appurtenances, to the ſaid manor, lordſhip, or deanery, and premiſes belonging, enjoyed therewith, or reputed as part thereof, (excepting tithes and mines), to the uſe of himſelf and his heirs until the marriage, then to himſelf for life, remainder to the firſt and other ſons of the marriage in tail male, remainder to himſelf and the heirs male of his body, remainder to the daughters of the marriage in tail, remainder to his own right heirs. There was iſſue of this marriage one daughter only, *Eleanor*, married to Sir *Richard Hilton*, and mother of Mrs. *Jolliffe*. The ſaid *John Hedworth* (previouſly to his marriage with a ſecond wiſe, the mother of Lady *Milbanke*), being tenant in tail under the above ſettlement, barred the limitations to the daughters of the firſt marriage, by recovery ſuffered in conſequence of a leaſe and releaſe, dated the 4th and 5th *September* 1724, whereby he granted, bargained, ſold, and releaſed all that the manor or lordſhip, or deanery of *Cheſter le Street*, with the appurtenances, *&c.* (deſcribing the premiſes in the ſame words as uſed in the ſettlement), and all other his lands, tenements, coal-mines, tithes, and *hereditaments* whatſoever, to *A. B.* as tenant to the *precipe* for ſuffering a recovery to the uſe of himſelf in fee. The recovery was ſuffered on the 2d *October*, 11 *Geo.* 1. of the manor or deanery of *Cheſter le Street*, with its members and appurtenances, 30 meſſuages, 120 cottages, 1 dovehouſe, 10 gardens, 1300 acres of land, 1400 acres of meadow, 1300 acres of paſture, 20 acres of wood, 200 acres of furze and heath, 400 acres of moor, and alſo mines of coal and common of paſture for all cattle, with the appurtenances in the pariſh of *Cheſter in the Street*. On the 15th *December* 1746 *John Hedworth* by his will deviſed to Sir *Richard Hilton* and Sir *Ralph Milbanke*, and their heirs, all that his deanery, prebend, rectory, and vicarage of the collegiate church and pariſh of *Cheſter in the Street*, and the manor and royalties thereof, and all tithes, *&c.* thereunto belonging, and all other his meſſuages, lands, and hereditaments, in truſt as to one moiety thereof for his daughter *Eleanor*, Lady *Hilton* (mother of Mrs. *Jolliffe*), and the heirs of her body; and as to the other moiety for his daughter *Elizabeth* (the mother of Lady *Milbanke*), and the heirs of her body, with remainders to the heirs of his body. The teſtator gave his copyhold eſtates upon the like truſts, and in his deviſe thereof directed that if his daughter Lady *Hilton* ſhould make any other claim upon them than under his will, every deviſe in her favour contained therein ſhould be void. On the 26th and 27th *June* 1754, Sir *Richard* and Lady *Hilton* conveyed all that moiety and all other the part and ſhare of Lady *Hilton* of and in the manor or deanery of *Cheſter le Street*, with the appurtenances, and the advowſon, donation, and right of preſentation of, in, and to the church, curacy, or donative of *Cheſter* aforeſaid, and of all thoſe farmholds, tithes, *&c.* late of the ſaid *John Hedworth*, *&c.* to a tenant to the *præcipe* for ſuffering a recovery, to the uſes therein mentioned. The recovery then ſuffered was of a moiety of the manor or deanery of *Cheſter, &c.* and alſo of all and all manner of tithes, *&c.* and alſo of the advowſon, donation, and right of preſentation of, in, and to the church of *Cheſter in the Street*. Sir *Ralph* and Lady *Milbanke* afterwards ſuffered a recovery of the other moiety by the ſame deſcription.

On the 31ſt of *March* 1772, Mr. *Jolliffe* conteſting the alternate right of preſentation derived through Lady *Milbanke*, a rule was obtained in the Court of Pleas at *Durham*, on behalf of Sir *R. Milbanke* and his eldeſt ſon by *Elizabeth* his wife deceaſed, calling on Mr. *Jolliffe* and *Eleanor* his wife to ſhew cauſe why the writ of entry of the recovery ſuffered by *John Hedworth*, 2d *October*, 11 *Geo.* 1. ſhould not be amended by inſerting the words, " *ac etiam advocationem, preſentationem, donationem, nominationem, liberam diſpoſitionem et jus patronatus eccleſiæ de* Cheſter le Street, *ac etiam advocationem, preſentationem, donationem, liberam diſpoſitionem et jus patronatus de curatione de* Cheſter le Street," next after the words *quadragint. acras moræ*; and why the writ of ſeiſin and the record of the recovery, and exemplification thereof, and all entries and proceedings relating to the ſame recovery, ſhould not alſo be amended accordingly.

On the part of Mr. and Mrs. *Jolliffe* it was inſiſted, that by the ſettlement of the 27th and 28th of *Auguſt* 1714, the curacy of *Cheſter le Street* paſſed under the general word *hereditaments*, and was properly ſettled to uſes, and remained ſo ſettled, there being no words in the recovery proper for a recovery to paſs the nomination to the curacy, conſequently that Mrs. *Jolliffe*, as heir of the body of *John Hedworth* by *Suſanna Sophia* his firſt wife, was ſolely entitled to the nomination. The amendment to the recovery therefore was oppoſed as affecting the right of Mrs. *Jolliffe*.

On the part of Sir *Ralph Milbanke* and his ſon it was urged, that it appeared from the whole caſe, and particularly from the deviſes in the will of *John Hedworth* of the 15th of *December* 1746, that it was his intention by the ſettlement of 4th and 5th *September* 1724, and the recovery ſuffered thereupon, to include the advowſon; and the recovery ſuffered by Sir *Richard* and Lady *Hilton* in 1754, was alſo relied upon to ſhew that they did not conſider themſelves entitled to more than a moiety of the advowſon. It was therefore contended that as the intention of *John Hedworth* to include the advowſon appeared, if the recovery did not contain proper words to effectuate ſuch intention it was amendable.

The matter having been argued before the Juſtices of the Court of Pleas on the 16th *April* 1772, it was referred to Mr. Juſtice *Gould* and Mr. Juſtice *Willes*, the temporal chancellor of the county palatine of *Durham*, and both of them Juſtices of the Court, for their opinion thereupon, who were deſired to appoint the parties to attend them by their counſel, if they thought proper, in order to have the ſaid matter of law fully argued before them; and the ſaid Juſtices were requeſted to certify their opinion to the ſaid Court.

The certificate was as follows.

" We are of opinion that the recovery ought to be amended by inſerting the words in the manner prayed by the motion. *H. Gould. E. Willes. Serjeants Inn, June* 2d, 1772."

On the 23d of *June* 1772, after hearing counſel on both ſides, the Court of Pleas made the rule for the amendment abſolute.

Nov. 27th.

Hartshorn and Another, Aſſignees of Wright, a Bankrupt *v.* Mary Slodden.

If a debtor at the inſtance of his creditor give goods out of his ſhop in part payment of a bond not then due, and ſhortly afterwards become bankrupt, the mere circumſtance of the bond not being due will not alone vitiate the part payment on the ground of fraudulent preference.

Trover for goods. The cauſe was tried at the laſt Summer Aſſizes for *Kent*, before Lord *Kenyon*, and a verdict found for the Plaintiffs for 90*l.*, with liberty to the Defendant to move to have a nonſuit entered, if the Court ſhould think him entitled to do ſo under the following circumſtances. The bankrupt being indebted to the Defendant in 150*l.* for which he had given his promiſſory note, was applied to by her on the 10th of *September* 1800 for a further ſecurity, upon which he gave her a bond for payment of the debt with intereſt in ſix months. After this, hearing that the bankrupt was in failing circumſtances, the Defendant on the 29th of *November* in the ſame year deſired the bankrupt to let her have ſome of the goods out of his ſhop, which was a ſhop for the ſale of earthen ware, and full of goods, in payment of her debt. The bankrupt having agreed to this, a perſon on behalf of the Defendant went to the bankrupt's houſe about 3 o'clock in the afternoon of the ſame day, and began packing up and ſending away to the Defendant's a conſiderable quantity of *Staffordſhire* ware. The packing up laſted till after it was dark, and ſome of the goods were removed in the dark, but no privacy in the tranſaction was attempted. The bankrupt made out a bill of parcels to the Defendant, in which he charged the goods at 90*l.*, which was more than their value, and an indorſement was made upon the bond for the receipt of 90*l.* in part payment of the debt. The quantity of *Staffordſhire* ware removed was conſiderably more than the Defendant could have any uſe for in her family, and ſhe was not in trade. On the 5th or 6th of *December* following, the bankrupt was arreſted, and on the 9th, while in priſon, executed an aſſignment of all his effects, which conſtituted the act of bankruptcy. It being contended that this was a fraudulent preference on the part of the bankrupt, becauſe the bond was not due at the time the goods were required by the Defendant and delivered to her, Lord *Kenyon* adviſed the Jury to find a verdict for the Plaintiffs for 90*l.* the amount of the charge in the bill of parcels, in order that the point might be brought before the Court, and no further expence be incurred, if they ſhould think ſuch a verdict could be maintained in law.

Accordingly a rule *niſi* for entering a nonſuit having been obtained on a former day,

Beſt and *Praed* Serjts. now ſhewed cauſe. If the transfer of the property in queſtion was made in contemplation of an act of bankruptcy, it was clearly void. Now the nature and quantity of the goods, as well as the time and manner of removal, equally ſhew that the tranſaction was not in the ordinary courſe of trade; and indeed the demand of the goods was founded on a knowledge that the bankrupt was in failing circumſtances. It cannot be ſaid that the transfer was made under any threat or fear of legal proceſs, ſince the Defendant was not in a ſituation to threaten the bankrupt, the original debt being extinguiſhed by the bond, and the bond itſelf not being due. The tranſaction therefore muſt be taken to be a voluntary transfer in contemplation of bankruptcy, for the purpoſe of giving the Defendant a preference over the other creditors. In *Alderſon* v. *Temple*, 4 *Burr.* 2239. Lord *Mansfield* conſiders the queſtion, whether a transfer made upon the eve of a bankruptcy be void or not, as depending on this, Whether it be done in the ordinary courſe of buſineſs? And in *Ruſt* v. *Cooper*, *Cowp.* 633. Lord *Mansfield* ſays, where a ſale of goods is fraudulent, and done with no other view whatſoever but to defeat the equality of the bankrupt laws, it is void on account of ſuch intended fraud; and he alſo relied on the circumſtance that the Defendant in that caſe never bought or dealt in the kind of goods transferred. The caſe of *Smith* v. *Payne*, 6 *Term Rep.* 152. is no authority in the preſent caſe, becauſe there the Jury expreſsly negatived any fraudulent preference, whereas here the queſtion of fraud is left open for the Court to decide. Beſides, in that caſe the debt was due (*a*) at the time when the goods were delivered to the creditor.

Shepherd Serjt. in ſupport of the rule. The only queſtion is, Whether the circumſtance of the bond not being actually due at the time when the goods were delivered, will make that delivery void, which would clearly have been good had the bond been

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(*a*) Indeed in *Singleton and Others, Aſſignees of Howell* v. *Butler*, *ante*, p. 283. where payment of a note was defeated on the ground of fraudulent preference, Lord *Eldon* partly diſtinguiſhed the caſe from that of *Smith* v. *Payne*, by obſerving that in the latter "the ſecurity was taken for a debt actually due."

1801.

Hartshorn and Another v. Slodden.

over-due? A bond is *debitum in præſenti*, though *ſolvendum in futuro*; and if the obligor, upon application from the obligee, pay the debt before the day of payment expreſſed in the bond, there can be no ground to impute fraud. The caſe of *Thompſon* v. *Freeman*, 1 *Term. Rep.* 155. is deciſive of this point. For there the Defendant having joined with the bankrupt in two bonds, the latter before the bonds became due, or the Defendant had been damnified, ſent for the Defendant in conſequence of a letter intimating his failing ſituation (which letter he by miſtake conceived to have come from the Defendant's agents), and propoſed to him to take out his debt in goods; to which the Defendant acceded, and a warrant of attorney was given, upon which the goods were taken; and the Defendant was held to be entitled to retain the goods.

Lord Alvanley Ch. J. The caſe of *Thompſon* v. *Freeman* has ſatisfied the only doubt which I entertained. The impreſſion of the caſe upon my mind was favourable to the Defendant, and I only wiſhed for an authority to ſanction my opinion: ſuch an authority has now been produced, for the caſe of *Thompſon* v. *Freeman*, as far as principle is concerned, is deciſive of the preſent. In this caſe a debt was *bonâ fide* due from the bankrupt to the Defendant upon a promiſſory note; and the latter finding that the former was in failing circumſtances, applied for a better ſecurity, and received a bond, with a condition that it ſhould be void on payment of the debt in ſix months. Though it be clear in point of law that this bond extinguiſhed the debt, and that it did not give any new right of action until after the lapſe of ſix months; yet the parties probably knew nothing of all this; and for any thing that appears they may have ſuppoſed that the Defendant had the ſame right to enforce the bond by action which ſhe had before to enforce the debt. Soon after the Defendant began to ſuſpect that the bankrupt's circumſtances were growing worſe; upon which ſhe demanded a further ſecurity for her debt, namely, a delivery of goods, which demand was accordingly complied with. It is admitted that a trader cannot in contemplation of bankruptcy diſpoſe of his goods of his own accord without application on the part of his creditor. But it is not ſufficient to avoid the delivery of goods by a trader that ſuch delivery be made voluntarily on his part, and that an act of bankruptcy enſues; it muſt alſo appear that he had the act of bankruptcy in contemplation

1801.

Hartshorn and Another v. Slodden.

tion at the time of the delivery. Nor has it ever been held that if a creditor preſs for payment of his debt, and thereby obtain goods, that the intention of the bankrupt ſhall be called in aid to ſet aſide the transfer. If the goods be delivered through the urgency of the demand, or the fear of proſecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding. The caſe which has been cited directly applies. Mr. Juſtice *Buller* there left it to the Jury to conſider, "whether the means which the bankrupt put into the Defendant's hands to pay himſelf were fraudulent or not; for if ſhe had executed the warrant of attorney from neceſſity in order to ſave herſelf, though perhaps acting by miſtake, or under a falſe apprehenſion that the Plaintiff was taking due means to enforce his demand upon her, it was certainly a legal act; but if ſhe had acted with a view to favour the Defendant, and give him an unjuſt preference, it was void." From the report of Lord *Kenyon* we are certainly not to conſider this as a caſe of fraud, except ſo far as fraud is to be inferred from the circumſtance of the bond not being due. The caſes of *Alderſon* v. *Temple*, and *Harman* v. *Fiſher*, proceeded on the ground of the transfer of property not being completed; and therefore do not apply to this caſe; but it has been eſtabliſhed by ſubſequent deciſions, that it is competent to a creditor to preſs his debtor for a further ſecurity at any time previous to the bankruptcy; and if a ſecurity be *bonâ fide* given under the impreſſion of an obligation, and not ſpringing from the voluntary act of the bankrupt, ſuch ſecurity is good. And the caſe of *Thompſon* v. *Freeman* completely ſatisfies me, that the circumſtance of the bond not being enforceable by immediate arreſt makes no difference. Here the Defendant demanded a further ſecurity for the debt previous to any act of bankruptcy; and we are not to preſume that the delivery was voluntary on the part of the bankrupt, ſince we muſt underſtand from the report of the noble and learned Judge, that if it had not been for the queſtion of law reſpecting the bond not being actually due, the Jury would have found a verdict for the Defendant.

Heath J. I am of the ſame opinion. It appears to me that there is not only no fraud found in this caſe, but no ground from which the Jury could have inferred fraud. A bankrupt has the diſpoſition of his property till the moment when he commits an act of bankruptcy; and unleſs he diſpoſe of it *in fraudem legis*,

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1801.

Hartshorn and Another v. Slodden.

his transfer will be good. Fraud indeed changes the complexion of things both in civil and criminal caſes. Thus if thieves under pretence of legal proceſs perſuade thoſe within the houſe to open the door, and then ruſh in and rob the houſe, it is nevertheleſs burglary, for the law will ſupply the breaking, becauſe the device by which they entered was *in fraudem legis*. But it is not ſufficient to impeach a payment that the debtor voluntarily pay his creditor, unleſs at the time he ſo pay him he has an act of bankruptcy in contemplation. If a father advance portions to his children, ſuch advance is voluntary, but not fraudulent, unleſs in contemplation of bankruptcy.

Rooke J. I entirely concur in opinion with the reſt of the Court in thinking that a nonſuit ought to be entered. There may perhaps be ſome circumſtances in the report leading to a ſuſpicion of fraud; but I have no doubt that if the whole caſe had been left to the jury, a verdict would have been found for the Defendant, and the imputation of fraud would have been negatived; for Lord *Kenyon* adviſed the Jury to find a verdict for the Plaintiff, merely for the purpoſe of bringing the queſtion of law before this Court. The queſtion, excluſive of fraud, is this, Whether the Court muſt neceſſarily imply this tranſaction to be illegal from the ſingle circumſtance of the bond not being due? It is true, that by giving the bond, the nature of the debt was changed, and the payment of it could not have been enforced at the time when theſe goods were given. But I do not hold that every *bonâ fide* payment of a debt, to which the party could not be abſolutely compelled, is neceſſarily a fraud upon the bankrupt laws. Though the payment be ſo far voluntary that it could not have been enforced, yet it is not therefore void, unleſs made colluſively between the parties in contemplation of bankruptcy. In the preſent inſtance the payment was by way of anticipation of a debt not then actually enforceable. Now the caſe of *Thompſon* v. *Freeman* is in point to ſhew, that ſuch a payment may be good if made at the requeſt of the creditor. There is alſo a caſe of *Haſſel* v. *Simpſon*, *Co. B. L.* 85. (*a*) in which Lord *Mansfield* ſeems to hold the ſame doctrine. The bankrupt there having conveyed to the Defendant (who had become ſurety for him in a bond which the Defendant was not called upon to pay till after the bankruptcy) a copyhold eſtate and

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(*a*) Fourth Edition.

all his ſtock in trade, and perſonal eſtate, Lord *Manſfield* ſays, "if he had conveyed only the copyhold, and that at the requeſt of the ſurety, it would have been good." This caſe appears to me ſtrongly to corroborate that of *Thompſon* v. *Freeman*. On general principles likewiſe a trader has as much right to pay his debts before they become actually due as any other perſon; and the creditor is not to loſe the benefit of ſuch payment becauſe a bankruptcy enſues, unleſs it be made with a view to defeat the policy of the bankrupt laws.

Chambre J. The payment of a debt before it is recoverable may be a material circumſtance from whence a Jury may infer, together with other circumſtances, that ſuch payment was fraudulent. The rule appears to me to be this. Any payment made by a trader before an act of bankruptcy, and in contemplation of ſuch act, and with a view on his part to give a preference to a particular creditor, is void. This doctrine indeed is new, and has been introduced within our own memory; but affords a good rule, becauſe founded in equity. In this caſe however the queſtion is, Whether the circumſtance of the debt not being payable is of itſelf, and in point of law, ſufficient to avoid the payment altogether as fraudulent? I cannot think that it is. It is perfectly clear that the Defendant in this caſe ſought for payment of her debt, becauſe ſhe was apprehenſive of a bankruptcy; judging from appearances, ſhe thought her debtor in bad circumſtances, and therefore uſed due diligence to obtain payment of her debt, as any fair creditor might have done. But we cannot ſay that the ſingle circumſtance of the bond not being payable at the time is ſufficient to make the payment fraudulent. Perhaps it might have been as well if the whole queſtion had been left to the Jury; but I underſtand from the report, that if this point had not occurred, the verdict muſt have been for the Defendant; and indeed I think it ought to be for the Defendant notwithſtanding this point. Great ſtreſs has been laid on the late delivery of the goods, but although that circumſtance ſhews that the Defendant was under apprehenſion, it does not prove fraud; for it appears that the perſons who removed the goods began early, and we can only infer therefore that they were unwilling to leave the work unfiniſhed. Indeed, if a fraudulent preference had been intended, the bankrupt would have paid off the whole debt, for the ſhop was full of goods, and thoſe removed by the Defendant conſtituted only a ſmall part of the ſtock.

Beſides the bankrupt made a very good bargain, for in making out his bill of parcels he charged the Defendant a higher price than the goods were worth. It is true that the Defendant could not have put the bond in ſuit at that time, but ſtill ſhe might have injured the bankrupt's credit by being clamorous for her debt, and perhaps have prevented him from continuing his trade. It appears to me therefore that if the caſe had been left entirely to the Jury, the weight of evidence was ſo much in the Defendant's favour, that they muſt have found for her; for I do not perceive any circumſtance from which fraud can be inferred. Conſidering indeed that the payment of the bond at a time when it was not capable of being enforced by action was the only point reſerved, I think a nonſuit ought to be entered.

Rule abſolute.

Nov. 27th.

FOOTT *v.* COARE.

If the Plaintiff in an action of aſſault having recovered only 20 ſhillings damages, whereby he is entitled to no more than 20 ſhillings coſts, bring an action on the judgment, and obtaining judgment by default in that action enter it up for debt and coſts, the Court on affidavit of the Defendant being reſident in the city of *London*, and liable to be ſummoned to the Court of Requeſts, will, under the 39 and 40 *Geo.* 3. *c.* 104., ſet aſide the judgment as to the coſts.

THIS was an application to ſet aſide the judgment entered up in this caſe as to the coſts. The circumſtances under which the application was made were as follow. In *Hilary* Term laſt the Plaintiff commenced an action of aſſault in this Court againſt the Defendant, and at the *Guildhall* Sittings after that Term obtained a verdict for 20 ſhillings, whereby he became entitled to no more coſts than damages. The Plaintiff then brought an action of debt upon the judgment, upon which the Defendant's attorney tendered to the Plaintiff's attorney his 40 ſhillings, and gave him notice that if he took a judgment by default and entered it up for coſts, the Court would be moved to ſet that judgment aſide as to the coſts. This tender was refuſed, and judgment being ſuffered to go by default, was ſigned by the Plaintiff's attorney for debt and coſts in *Trinity* Term laſt, and an execution iſſued thereon in the vacation following. To found this application there was an affidavit on the part of the Defendant, ſtating that he was an inhabitant and reſident in the city of *London*, and liable to be ſummoned to the Court of Requeſts in that city, and that the debt ſued for and recovered by the Plaintiff amounted to no more than 40 ſhillings.

A rule *niſi* had been obtained on a former day, at which time the Court were referred to the 39 and 40 *Geo.* 3. *c.* 104. repeal-ing ſo much of the ſtatutes of *Jac.* 1. *c.* 15. and 14 *Geo.* 2. *c.* 10. as confined the juriſdiction of the Court of Requeſts to 40 ſhillings, and extending that juriſdiction to 5 *l.* The 12th ſection of the act enacts, "that if any action or ſuit ſhall be commenced in any other court than the ſaid Court of Requeſts for any debt not exceeding the ſum of 5*l.* and recoverable by virtue of the ſtatutes of *Jac.* 1. and *Geo.* 2. and of this act or any of them, in the ſaid Court of Requeſts, then and in every ſuch caſe the Plaintiff or Plaintiffs in ſuch action or ſuit ſhall not by reaſon of a verdict for him, her, or them, or otherwiſe, have or be entitled to any coſts whatſoever."

Beſt Serjt. now ſhewed cauſe, and relied in the firſt place on an affidavit, ſtating, that when a plea was demanded of the Defendant's attorney, the anſwer given was, that the Plaintiff might take a judgment if he pleaſed: 2dly, He inſiſted that the application was made too late, for that the Plaintiff ſigned his judgment in *Trinity* Term laſt, at which time the Defendant ought to have applied to the Court, and not have ſuffered the Plaintiff to take out execution before he made any complaint (*a*): 3dly, He argued, that as this was the caſe of a judgment by default, the Court would not attend to the application, and cited *Brampton* v. *Crabb*, 1 *Str.* 46.: and, 4thly, That the words of the 39 and 40 *Geo.* 3. being, "by reaſon of a verdict or otherwiſe," this caſe did not fall within the proviſion, being a judgment by default.

Shepherd Serjt. in ſupport of the rule obſerved, that even ſuppoſing the Defendant to be late in his application, ſtill that objection could not apply to a caſe like the preſent, where the ground of the application was, that the judgment for the coſts was void, the Plaintiff being deprived of coſts by the proviſions of 39 and 40 *Geo.* 3.; but he contended that the application was made as early as poſſible, the execution having only been taken out in the vacation (till which time the Defendant had no reaſon to ſuppoſe the Plaintiff would attempt to enforce a judgment contrary to law) and the Court being moved early in this Term. He alſo contended, that under the words "by verdict or otherwiſe," a judgment by default was clearly included, unleſs the words "or otherwiſe," were to be deemed altogether inoperative.

(*a*) But the judgment in this caſe being defective, not irregular, the lateneſs of the application could not cure the defect. *Goodwin* v. *Parry*, 4 *Term Rep.* 577. *Huſſey* v. *Wilſon*, 5 *Term Rep.* 254.

CHAMBRE J. at firſt expreſſed ſome doubt, whether actions of debt upon judgment were not local, and therefore not within the proviſions of the 39 and 40 *Geo.* 3.

But on conſidering the words of the act, which are (*a*), "all debts, whether upon ſimple contract or otherwiſe," and that the only exception of ſpecialty debts was (*b*), "any debt by ſpecialty which ſhall not be for the payment of a ſum certain," and that actions on judgments were not within the exception,

The whole *Court* was of opinion that the preſent caſe fell within the proviſions of the act, and that it would be moſt vexatious if every Plaintiff obtaining a ſmall ſum by way of damages ſhould be at liberty to bring an action of debt upon the judgment in the ſuperior court, and haraſs the Defendant with additional coſts.

Rule abſolute.

(*a*) S. 1.

(*b*) S. 11.

Nov. 27th.

LAWSON *v.* M'DONALD.

Affidavit to hold to bail made by *A.* in reſpect of a debt due to *B.* before his diſcharge under an inſolvent act, whereby *B.*'s eſtate became veſted in the Clerk of the Peace, and negativing a tender in bank notes to the knowledge or belief of *A.*, held ſufficient, the Court allowing *A.* and *B.* by ſubſequent affidavit to ſhew that *A.* uſually tranſacted *B.*'s buſineſs when out of town, and that at the time when the affidavit to hold to bail was made, *B.* was out of town, and that an immediate arreſt was neceſſary, as the Defendant was about to ſail on a voyage.

THE Defendant in this caſe was holden to bail upon the affidavit of *Jonah M'Ewin*, who depoſed that the Defendant was juſtly indebted to the eſtate of *Andrew M'Ewin*, formerly of, &c. late of, &c. and alſo late a priſoner in the *King's Bench* priſon, and diſcharged therefrom under the late inſolvent act, 41 *Geo.* 3., in the ſum of 41 *l.* 9 *s.* 6 *d.* for goods ſold and delivered by the ſaid *Andrew M'Ewin* to the Defendant before the 1ſt of *March* laſt, and before his taking the benefit of the ſaid act; that the Defendant was commander of a ſhip bound for *Jamaica*, and that he was about to ſail for *Jamaica* on *Saturday* then next, as the deponent had been informed and believed; that by virtue of the ſaid act the legal eſtate of and in the effects of the ſaid *Andrew M'Ewin*, which before the 1ſt of *March* laſt he was poſſeſſed of or entitled to, became veſted in the Plaintiff, the clerk of the peace for the county of *Surry* in truſt for the benefit of the creditors of the ſaid *Andrew M'Ewin*, under and by virtue of the ſaid act, as the deponent had been informed and believed; and that no tender or offer had been made to pay the ſaid ſum of 41 *l.* 9*s.* 6*d.* or any part thereof, in notes of the Governor and Company of the Bank of *England*, expreſſed to be payable on demand, to the knowledge or belief of the deponent.

A rule *niſi* was obtained for diſcharging the Defendant upon a common appearance, on the ground of the tender in bank-notes not being properly negatived, inaſmuch as it did not appear that *Jonah M'Ewin* the deponent had any connection with the parties to the action, and as he only negatived the tender to his knowledge or belief.

Shepherd Serjt. now ſhewed cauſe, and produced affidavits of *Jonah M'Ewin*, and alſo of *Andrew M'Ewin* the inſolvent, the former of whom ſtated that he was the father of the inſolvent; that he was in the habit of tranſacting his ſon's buſineſs when he was out of town, and that having heard that the Defendant was about to ſail, he made the above affidavit for the purpoſe of holding him to bail: and the latter ſtated that he was out of town at the time when the arreſt was made, and added that the debt was due, and that no tender in bank-notes had been made to him. He contended, that although no ſupplemental affidavit could be admitted for the purpoſe of ſupplying any defect in the original affidavit relative to the tender in bank-notes, yet that it was competent to the Plaintiff to produce affidavits to explain the ſituation of the Deponent in the affidavit to hold to bail, and to ſhew the reaſons which entitled him to make ſuch an affidavit; that it now appeared that the inſolvent was not in town at the time when the arreſt became neceſſary, and that his father had the management of his affairs when he was out of town, which therefore enabled him to make the affidavit; and that if he was entitled to make the affidavit, it could not be neceſſary that he ſhould do more than ſwear to his knowledge and belief. He inſiſted that in theſe caſes the affidavit muſt in general be made by ſome perſon different from the original creditor, ſince the inſolvent himſelf is ſeldom to be found; and that the clerk of the peace could not be required to make it, ſince although the property be veſted in him by law, he can know little of the affairs. He cited *Chatterley* v. *Finck*, *ante*, 390. to ſhew that an affidavit explanatory of the deponent's ſituation might now be received, and to prove, that where the principal is not in town the affidavit may be made by another perſon who has cognizance of the circumſtances; alſo the *Mayor* of *London*

1801. LAWSON *v.* M^cDONALD. *don* v. *Dias*, 1 *Eaſt*. 237. to ſhew, that where the affidavit may be made by any perſon but the principal, it is ſufficient if he negative a tender to the beſt of his knowledge and belief.

Beſt Serjt. *contrà* relied upon *Bolt* v. *Miller*, *ante*, 420. to ſhew, that no ſuch explanatory affidavits as had now been produced ought to be received, and alſo that at all events the inſolvent ought to have joined in the affidavit (*a*); obſerving that it did not appear but that a tender might have been made to him previous to the 1ſt of *March*, when the aſſignment of his effects took place.

Lord ALVANLEY Ch. J. In a caſe circumſtanced like this, it is impoſſible to expect a poſitive affidavit. But there muſt be reaſonable evidence appearing upon the face of the original affidavit that no tender was made; and no ſupplemental affidavit as to that point can be admitted. But an affidavit may be admitted to ſhew, that the deponent was in ſuch a ſituation as to entitle him to negative the tender to the beſt of his knowledge and belief. The beſt evidence muſt be obtained which the caſe will admit of. In this caſe the inſolvent was out of town at the time of the arreſt, and if the arreſt had not been made then, the Defendant would have ſailed, and the opportunity of arreſting would have been loſt.

HEATH J. Every thing having been done in this caſe which could be done, I think that the arreſt is good.

ROOKE and CHAMBRE Js. concurred.

Rule diſcharged.

(*a*) Had he been in *London* when the affidavit was made, this would have been neceſſary, according to the caſe of *Bolt* v. *Miller*, and the tender muſt then, as it ſhould ſeem, have been expreſsly negatived, *ibid*. and *Elliott* v. *Duggan*, 2 *Eaſt*. 24.

WHITBREAD *v.* MAY and Another.

Nov. 28th.

A. deviſed his "eſtate at *Luſhill* in the county of *Wilts*, and *Hearne* and *Buckland* in the county of *Kent*," to his ſon in fee. At the time of the deviſe *A.* had lands in the pariſh of *Hearne*, and alſo in the ſeveral pariſhes of *C.*, *W.*, *S.*, *R.*, and *S.*, all which he purchaſed by one contract from one perſon, and uſed to call his "*Hearne* eſtate," or "*Hearne Bay* eſtates." The eſtate at *Luſhill* in *Wilts*, and alſo a farm called *Buckland Farm* in *Kent*, were ſold before the teſtator's death, and at the time of his death he had no eſtate in *Kent* except that which lay in the pariſhes of *Hearne*, *C.*, *W.*, *S.*, *R.*, and *S.*

Qu. Whether the above facts be admiſſible in evidence to ſhew that the teſtator intended to paſs the land in the ſeveral pariſhes of *C.*, *W.*, *S.*, *R.*, and *S.*, as well as that in the pariſh of *Hearne*?

THIS was an iſſue directed by the Court of Chancery under a decree made by the Maſter of the Rolls, to try, Whether the ſeveral lands (ſituate in the ſeveral pariſhes of *Hearne*, *Chiſlet*, *Winſborough*, *Sturry*, *Reculver*, and *Swacliffe*) which the Plaintiff contracted to ſell to the Defendant, paſſed by the codicil to the will of the teſtator *Samuel Whitbread* (the Plaintiff's father), bearing date the 24th of *June* 1795?

The cauſe was tried before Lord *Eldon*, Ch. J. at the *Guildhall* Sittings after *Hilary* Term laſt, when a verdict was found for the Plaintiff, damages 20 *l.*, ſubject to the opinion of the Court on the following caſe.

On the part of the Plaintiff it was proved, that *Samuel Whitbread*, Eſq. deceaſed, the father of the Plaintiff, being ſeized in fee of very conſiderable real eſtates ſituate in different parts of the kingdom, by his will, dated 24th *June* 1795, deviſed all and every his freehold eſtates and hereditaments whatſoever and whereſoever (except as therein was excepted) unto certain truſtees therein named, and their heirs, upon the truſts in the ſaid will ſpecified, and amongſt others in truſt for his ſon *Samuel Whitbread*, Eſq. the Plaintiff and his aſſigns, for life, with divers remainders over in ſtrict ſettlement, and by a codicil to his ſaid laſt will and teſtament, dated the 24th day of *June* 1795, the ſaid teſtator deviſed as follows: "And whereas I have in and by my ſaid will given, deviſed, and bequeathed, all and every my freehold eſtates and hereditaments whatſoever and whereſoever, except ſuch of them as are included in my ſon's marriage ſettlement, and ſuch parts of my brewhouſe as are freehold, unto my ſon-in-law *James Gordon*, jun. and my nephews *Jacob Whitbread* and *John Wingate Jennings*, and their heirs, to the uſe of my ſon *Samuel Whitbread* for life, with remainder over as therein expreſſed; and it is my will and deſire to give part of my eſtates, and hereinafter mentioned lands, unto my ſon abſolutely: now I do hereby revoke my ſaid will ſo far as relates to my ſeveral eſtates at *Luſhill* in the county of *Wilts*, and *Hearne*, and *Buckland*, in the

1801.

WHITBREAD *v.* MAY and Another.

" county of *Kent*; and I do hereby give, deviſe, and bequeath, " the ſame eſtates at *Luſhill*, *Hearne*, and *Buckland*, unto my ſaid ſon " *Samuel Whitbread*, his heirs and aſſigns, for ever, in order that he " may immediately ſell the ſame if he thinks proper."

On the part of the Plaintiff was alſo read in evidence a general rental of all the teſtator's eſtates made out regularly in a book by his private clerk; and it was proved by that clerk that the teſtator was in the habit of conſtantly looking into and examining that book, in which was contained the following entry relating to the eſtates mentioned in the declaration in this cauſe, and referred to by the ſaid will and codicil.

" *Kent.*

Hearne, &c. *Hearne Bay* eſtates,

Purchaſed of Sir *George Colebrooke* Bart. and his truſtees, 30th *June* 1773.

Conſiſts of ſundries, as under, expectant on the death of *Gilbert Knowler* Eſq. in failure of iſſue by his wife *Barbara*; and after his death ſubject to the payment of 230*l.* *per annum*, part of 350*l.* *per annum*, her whole ſettlement payable to the ſaid *Barbara* during her life, provided ſhe ſurvives the ſaid *Gilbert Knowler*.

Viz.

The manors of *Underdowns* and *Lotting*.—A capital manſion-houſe and garden, with coach-houſe and ſtables, and other appurtenances, now in the occupation of Mr. *Knowler*, with the following lands, *viz.*

Paſture ground adjoining the houſe -	£. 40	0	0
Hop ground - - - - -	7	0	0
Wood ground about - - - -	60	0	0
	£. 107	0	0
Nine meſſuages and tenements, being 4 farms and 5 cottages, with arable and paſture lands, in the pariſhes of *Hearne*, *Chiſlet*, *Winſborough*, *Sturry*, *Reculver*, and *Swacliffe*, amounting to about	453	0	0
	£. 560	0	0"

And the Plaintiff alſo produced in evidence a memorandum book, all in the teſtator's handwriting, containing a particular of the ſaid eſtate purchaſed by him from Sir *George Colebrooke*

Bart. and his truſtees; at the top of each page whereof in the ſaid teſtator's writing, are the words "*Hearne* eſtate."

The eſtate in the ſeveral pariſhes of *Hearne*, *Chiſlet*, *Winſborough*, *Sturry*, *Reculver*, and *Swacliffe*, called by the ſaid teſtator in his ſaid books, "the *Hearne*," or "*Hearne Bay* eſtate," conſiſts of the reverſion or remainder expectant on the deceaſe of *Gilbert Knowler* Eſquire, of and in premiſes ſituate in the pariſh of *Hearne*, and alſo in the ſaid ſeveral pariſhes of *Chiſlet*, *Winſborough*, *Sturry*, *Reculver*, and *Swacliffe*, the whole of which were purchaſed in one contract from *Gilbert Knowler* Eſquire, by Sir *George Colebrooke*, and from him and his truſtees by the teſtator; and it was proved that the teſtator uſed to ſpeak of the whole together as the "*Hearne* eſtate;" but the ſame is not called or deſcribed by the name of the "*Hearne Bay* eſtate," in any of the title-deeds belonging to the ſaid premiſes. The eſtate at *Luſhill*, deviſed in the codicil with the *Hearne* eſtate, conſiſts of the manor of *Luſhill*, and between 500 and 600 acres of land in the pariſh of *Caſtle Eaton* and *Hannington*, in the county of *Wilts*, and was ſold by the teſtator in his lifetime, after he had made his ſaid will and codicil. The teſtator had no eſtate at *Buckland*; but the *Buckland* eſtate, alſo mentioned in the codicil, conſiſted of a meſſuage and about 10 acres of land, all in one farm, called *Buckland* farm, in the pariſh of *Winſborough*, and was alſo ſold in the teſtator's lifetime, after he had made his ſaid will and codicil. The teſtator at his deceaſe had no eſtate whatever in the county of *Kent*, except the reverſion of the ſaid eſtate in the pariſhes of *Hearne*, *Chiſlet*, *Winſborough*, *Sturry*, *Reculver*, and *Swacliffe* above mentioned.

The queſtion for the opinion of the Court is, Whether the evidence above ſtated to have been produced on the part of the Plaintiff ought to have been admitted at the trial of this cauſe, and whether the verdict of the Jury is ſupported by that evidence? If that evidence ought to have been admitted, and the verdict of the Jury is ſupported by it, the verdict to ſtand. If it ought not to have been admitted, or does not ſupport the verdict of the Jury, a verdict to be entered for the Defendant.

This caſe was argued in *Trinity* Term laſt.

Beſt Serjt. for the Plaintiff. Upon the principles adopted in the determination of *Lord Walpole* v. *Lord Cholmondeley*, 7 *Term Rep.* 138.

the evidence in queſtion was properly admitted at the trial. In that caſe *Lawrence* J. ſays, "That in order to let in parol evidence, the Court muſt feel, that, if the evidence propoſed be admitted, it will raiſe an ambiguity." Now it is impoſſible to contend, that the evidence introduced into this caſe does not raiſe a doubt whether the teſtator did not, by the terms of his codicil, mean to deſcribe all that property which he uſually called his "*Hearne* eſtate," and not merely thoſe lands which lay in the pariſh of *Hearne*. Indeed it is very improbable that the teſtator ſhould have had the intention of ſeparating a ſmall part of that entire eſtate which he had purchaſed of Sir *George Colebrooke* from the reſidue. His intent appears to have been to paſs all the lands of which he was poſſeſſed in *Kent;* and accordingly he mentions by name his *Buckland* eſtate, becauſe that not being part of the lands purchaſed from Sir *George Colebrooke*, did not fall within the deſcription of his *Hearne* eſtate. The caſe of *Doe d. Clements* v. *Collins*, 2 *Term Rep.* 498. is applicable to the preſent caſe in two reſpects; 1ſt, To ſhew the admiſſibility of evidence, to prove that premiſes not falling within the words of a will are to be annexed to thoſe which do fall within the words of the will; and, 2dly, To ſhew that arguments of inconvenience ariſing from the ſeparation of property, which has uſually gone together, are entitled to great weight in conſtruing the intention of a teſtator. So in *Bryan* v. *Wetherhead*, *Cro. Car.* 17. the Court received evidence to ſhew, that a building adjoining to a meſſuage, paſſed under the words "the meſſuage called *Keyſhams cum appurtenentiis*," and they were of opinion that it did not there paſs, becauſe it had not been reputed parcel of the houſe, and that caſe aroſe on the conſtruction of a deed, yet *Hobart* conceived "that in a deviſe peradventure it might paſs." The expreſſions of the teſtator reſpecting this eſtate are ſtronger evidence in the conſtruction of this deviſe than any which could reſult from common reputation; and indeed it would be abſurd to ſuppoſe that he meant to give his ſon the power of ſelling only a ſmall part of a particular eſtate, at the ſame time that he was tying up the remainder in ſtrict ſettlement.

Heywood Serjt. *contra*. The evidence in this caſe was improperly admitted; and even if it was properly admitted, ſtill the verdict as found by the Jury is not ſupported by that evidence. The caſe of Lord *Walpole* v. Lord *Cholmondeley* has eſtabliſhed the true diſtinction, *viz.*

viz. that parol evidence is not admiſſible, unleſs, if admitted, it would raiſe a doubt to what the words of the will apply. If it only raiſe a conjecture, it is not ſufficient. Now, in the preſent caſe, the premiſes in queſtion were deſcribed by the teſtator as the "*Hearne Bay* eſtate," and the "*Hearne* eſtate;" but the words in the codicil are "my eſtates *at Luſhill*, *Hearne*, and *Buckland*." The teſtator had lands in the pariſh of *Hearne* ſufficient to ſatisfy the words of the will; if, therefore, evidence be admitted to ſhew that lands in five other pariſhes were intended to paſs under the words of the codicil, it will not be admitted in explanation, but in contradiction of the codicil. It is true, that in *Godbolt* 16. under a deviſe of a houſe and lands called "*Jacks*," it was held that 100 acres of lands paſſed; but the reaſon given by *Anderſon* Ch. J. for that deciſion was, "that *Jacks* was the entire name of the houſe and lands;" whereas *Hearne* is not the entire name applicable to the lands in queſtion, ſince the greater part of them lie in pariſhes bearing other names. So in *Wyndham* v. *Wyndham*, 1 *And.* 58. the Court admitted evidence to ſhew, that a meſſuage, deſcribed to be the meſſuage *Ricardi Cotton* at *H.* in a deed of feoffment, was ſo named by the feoffor by miſtake, he having no meſſuage at *H.* but one which belonged to *Thomas Cotton*. If the verdict of the Jury is to ſtand, their deciſion in effect will be, that theſe lands lie at *Hearne*, when in fact they do not lie there. Nothing appears upon which either the Jury or the Court can raiſe a doubt; and indeed no caſe can be cited in which a will has been explained by evidence, where there has been ſomething upon which the words of the will could operate.

Cur. adv. vult.

On this day Lord ALVANLEY Ch. J. ſaid—There is a difference of opinion upon the Bench as to the admiſſibility of the evidence in this caſe; and in conſequence of that difference of opinion no concluſive judgment can be given in this Court. We have therefore communicated with the Lord Chancellor, before whom the cauſe was tried, upon the ſubject, and his Lordſhip has declared himſelf ready to put his ſeal to a bill of exceptions as if tendered to him at the trial, in order to enable the parties to take the opinion of another Court. The queſtion will be, Whether the words "the ſame eſtates at *Luſhill*, *Hearne*, and *Buckland*," are ſo deſcriptive of locality as to preclude the admiſſibility of evidence

that

that the teſtator intended to uſe them in any other ſenſe? In this Court judgment *pro formâ* muſt of courſe be given for the Plaintiff.

Judgment for the Plaintiff.

Nov. 28th.

CUNNINGHAM *v.* MACKENZIE and Another.

If in the deed ſecuring an annuity it be declared, that the judgment to be obtained under a warrant of attorney given at the ſame time ſhall be only a collateral ſecurity for the regular payment of the annuity, and that no execution ſhall iſſue thereon till default made in the payment for 14 days, and the memorial does not notice the above declaration, and in ſetting forth the warrant of attorney only ſtates generally that "ſuch warrant of attorney was executed for the better ſecuring the payment of the annuity as in the above ſtated deed is particularly mentioned;" the Court will ſet aſide the annuity for ſuch defect in the memorial.

THIS was an application to the Court to ſet aſide a judgment entered up on a warrant of attorney given to ſecure an annuity, and to have the warrant of attorney delivered up to be cancelled.

The principal objection to the annuity was, that in the indenture by which it was ſecured it was declared that the judgment to be obtained under the warrant of attorney was to be only a collateral ſecurity for the regular payment of the annuity, and that it was agreed that no execution ſhould be iſſued or taken out thereon until default ſhould be made in the payment of the annuity by the ſpace of fourteen days, whereas the memorial in ſetting forth the deed, did not ſpecify any ſuch declaration or agreement; and in ſetting forth the warrant of attorney, it only ſtated generally that ſuch warrant of atorney was "executed for the better ſecuring the payment of the annuity, as in the above ſtated deed is particularly mentioned."

Shepherd Serjt. ſhewed cauſe and contended, that it was apparent upon the face of the memorial that the warrant of attorney was given as a collateral ſecurity for the payment of the annuity; and if it were a collateral ſecurity it followed that no execution could be taken out until default made in payment of the annuity; that a proviſo of this ſort did not reſemble a proviſo of redemption, which is an eſſential part of the deſcription of the annuity granted, a redeemable annuity being a diſtinct thing from an annuity which is irredeemable; whereas the proviſo in the preſent caſe only related to the mode of obtaining a remedy in caſe of default being made in payment.

Beſt Serjt. on the other ſide was ſtopped by the Court.

CUNNINGHAM *v.* MACKENZIE and Another.

Lord ALVANLEY Ch. J. The ground on which the Court of *King's Bench* proceeded in the caſe of *Sawyer* v. *Bunce* (*a*), was that the clauſe of redemption being for the benefit of the grantor, it was right that he ſhould have an eaſy acceſs to it. If ſo, how does the preſent caſe vary in point of principle? Undoubtedly the clauſe omitted to be noticed in the memorial is a clauſe introduced for the benefit of the grantor.

HEATH J. I ſee no diſtinction between this caſe and thoſe in which annuities have been ſet aſide becauſe the clauſe of redemption was not noticed in the memorial. Poſſibly the grantor of this annuity never would have entered into the engagement which he has done, if this clauſe reſtraining the iſſuing any execution againſt him for a certain period had not been introduced.

ROOKE J. I am of the ſame opinion.

CHAMBRE J. This clauſe in favour of the grantor appears to me more neceſſary to be inſerted than the clauſe of redemption, becauſe this is to regulate the annuity while it ſubſiſts, whereas the other is only to put an end to it.

However, Lord ALVANLEY Ch. J. expreſſing a wiſh to have an opportunity of looking into the caſes before the point was finally decided, the caſe ſtood over till this day, when his Lordſhip and the reſt of the Court retaining the opinion thrown out by them when the caſe was argued.

The rule was made abſolute.

(*a*) *E.* 35. *G.* 3. *B. R. Hunt* on Annuities, *c.* 1. *ſ.* 5. p. 74. *Ed.* 2. cited 6 *Term Rep.* 737. See alſo *Stedman* v. *Purchaſe*, 6 *Term Rep.* 737. *Harris* v. *Stapleton*, 7 *Term Rep.* 205. and *ex parte Anſell*, *ante*, vol. 1. p. 62.

Nov. 28th.

GOODRIGHT on the ſeveral demiſes of *George* Earl of *Buckinghamſhire*, and *Albinia* his Wife, Sir CHARLES STEWART and ANNE LOUISA his Wife, JOHN Earl of *Weſtmoreland*, and THOMAS FANE,

v.

ARTHUR Marquis of *Downſhire*, and MARY his Wife.

EJECTMENT for one third part of a moiety of lands in *Chiſlehurſt*, *Mottingham*, and *Bromley*, in the county of *Kent*. The cauſe was tried at the *Maidſtone* Summer Aſſizes 1800, and a verdict was found for the Plaintiffs, ſubject to the opinion of the Court on the following caſe.

Thomas Farrington of *Chiſlehurſt* in the county of *Kent*, Eſq. being ſeiſed in fee-ſimple (amongſt others) of certain eſtates in *Chiſlehurſt*, *Mottingham*, and *Bromley*, in the ſaid county (which eſtates are of the tenure of *Gavelkind*) duly made and publiſhed his laſt will and teſtament, which bears date the 13th day of *January* 1758, and is atteſted by three witneſſes; and he thereby gave and deviſed all his manors, meſſuages, lands, tenements, hereditaments, and real eſtates whatſoever and whereſoever, which he, &c. unto and to the uſe of his nephew Lord *Robert Bertie*, and his aſſigns, for his life, remainder to the uſe of truſtees and their heirs during the life of the ſaid Lord *Robert Bertie* in truſt, to pre-

A. deviſed certain eſtates to *B.* for life remainder to his ſons and daughters in ſtrict ſettlement, remainder to *C.* for life, remainder to his ſons and daughters in like manner, remainder to his own right heirs, and died. *B.* being ſeiſed of the above eſtates as tenant for life, and alſo entitled to one ſixth of the reverſion as one of the right heirs of *A.*, made his will, whereby he gave to his wife for life, all ſuch freehold and copyhold lands as he had purchaſed or was ſeiſed of in fee-ſimple, or in exchange for other lands in *Kent*, and then after reciting that he had granted a leaſe for years to *D.* of the lands whereof he was tenant for life under *A.*'s will, declared that in caſe ſuch perſons as ſhould be tenants for life or otherwiſe of that eſtate by virtue of *A.*'s will ſhould not moleſt *D.* in the poſſeſſion of the ſaid lands as leaſed, and at the expiration of the leaſe ſhould grant a new leaſe to his, *B.*'s, wife for her life, then he deviſed his lands purchaſed of *E.* and *F.* and all lands that he then had or might have a right to, both freehold and copyhold, ariſing from exchange of land, act of Parliament, or otherwiſe in *Kent*, deviſed to his wife for her life, to go with and be ſubject to the ſame entail as the eſtates left by *A.* were or might be ſubject to by virtue of *A.*'s will, to take effect immediately after the deceaſe of his wife, and in ſuch caſe recommended his wife to give the furniture which belonged to the houſe on the eſtates left by *A.* to whomſoever might be living to enjoy it; but in caſe ſuch perſons as ſhould be tenants for life or otherwiſe by virtue of *A.*'s will ſhould refuſe to grant ſuch leaſe, or ſhould diſturb *D.*, then he gave to his ſaid wife and her heirs all his freehold and copyhold lands and houſes which he had before deviſed to her for life only. And all the reſt and reſidue of his real eſtate whatſoever, and all the reſt and reſidue of his perſonal eſtate of what nature or kind ſoever or whereſoever, he gave to his ſaid wife and her heirs, executors, adminiſtrators, and aſſigns for ever. *D.* was not moleſted, and a new leaſe was granted to the wife of *B.* for her life. Held that the wife of *B.* was entitled to the one ſixth of the reverſion under the reſiduary clauſe in *B.*'s will.

ſerve

GOODRIGHT ex dim. Earl of BUCKINGHAMSHIRE and Others *v.* Marquis of DOWNSHIRE et Ux.

ſerve contingent remainders, with remainder to the uſe of the firſt and other ſons of the ſaid Lord *Robert Bertie*, and the heirs of their bodies ſeverally and in ſucceſſion; and in default of ſuch iſſue, to the uſe of the firſt and other daughters of the ſaid Lord *Robert Bertie*, and the heirs of their bodies ſeverally and in ſucceſſion; and for default of ſuch iſſue, to the uſe of his couſin *Charles Townſhend*, Eſq. for his life, with remainder to the uſe of truſtees and their heirs during the life of the ſaid *Charles Townſhend* in truſt, to preſerve contingent remainders, with remainder to the uſe of the firſt and other ſons of the ſaid *Charles Townſhend*, and the heirs of the bodies of ſuch ſons ſeverally and in ſucceſſion; and in default of ſuch iſſue, to the uſe of the firſt and other daughters of the ſaid *Charles Townſhend*, and the heirs of their bodies ſeverally and in ſucceſſion; and in default of ſuch iſſue, then he gave and deviſed all and every his ſaid manors, meſſuages, lands, tenements, hereditaments, and real eſtate aforeſaid, unto his own right heirs for ever.

The ſaid *Thomas Farrington* died ſeiſed of the ſaid eſtates in the month of *February* 1758, leaving the deſcendants of his deceaſed ſiſter, *Albinia* the wife of the Duke of *Ancaſter*, that is to ſay, Lord *Vere Bertie*, *Auguſta Bertie* and *Frances Bertie* the only children of Lord *Montagu Bertie* then deceaſed, and Lord *Robert Bertie* named in the will of the ſaid teſtator, the ſaid Lord *Vere Bertie*, Lord *Montagu Bertie*, and Lord *Robert Bertie* being the ſons of the ſaid *Albinia* Ducheſs of *Ancaſter*, and his the teſtator's other ſiſter *Mary Selwyn*, his heirs according to the cuſtom of gavelkind.

Upon the death of the ſaid *Thomas Farrington*, the ſaid Lord *Robert Bertie* entered upon and took poſſeſſion of the ſaid eſtates in *Chiſlehurſt*, *Mottingham*, and *Bromley*, and continued to receive the rents and profits thereof until the time of his death, which happened on the 10th of *March* 1782.

The ſaid Lord *Robert Bertie* left no iſſue, and on his deceaſe the ſaid *Charles Townſhend* entered upon and took poſſeſſion of the ſaid eſtates, and continued to receive the rents and profits thereof until the time of his death; and he died on the 10th day of *Auguſt* 1799 without leaving any iſſue.

The ſaid Lord *Vere Bertie* died in the year 1770, leaving *Albinia*, now the wife of *George* Earl of *Buckinghamſhire*, and *Ann Louiſa*, now the wife of Sir *Charles Stewart*, his daughters and coheirs according to the cuſtom of gavelkind.

The ſaid *Auguſta*, one of the daughters of the ſaid Lord *Montagu Bertie*, intermarried with Lord *Bergherſh*, and died on the third of *January* 1766, leaving *John*, now Earl of *Weſtmoreland*, and the Honourable *Thomas Fane*, her ſons and coheirs according to the cuſtom of gavelkind; and the ſaid *Frances*, the other daughter of the ſaid Lord *Montagu Bertie*, died in or before the month of *February* 1771, leaving the ſaid *John* Earl of *Weſtmoreland*, and the ſaid *Thomas Fane*, her nephews and coheirs according to the cuſtom of gavelkind.

The ſaid Lord *Robert Bertie* at the time of his death, which happened on the 10th *March* 1782, as before ſtated, left the ſaid *Albinia*, the wife of the ſaid *George* Earl of *Buckinghamſhire*, *Ann Louiſa*, the wife of the ſaid *Charles Stewart*, *John* Earl of *Weſtmoreland*, and *Thomas Fane*, the leſſors of the Plaintiff, his heirs according to the cuſtom of gavelkind.

The ſaid Lord *Robert Bertie* being in poſſeſſion of the ſaid eſtates in *Chiſlehurſt*, *Mottingham*, and *Bromley*, deviſed to him by the ſaid will of the ſaid *Thomas Farrington*, and being ſeiſed in fee-ſimple of certain other freehold eſtates in *Chiſlehurſt* aforeſaid, which he had purchaſed or taken in exchange, duly made and publiſhed his laſt will and teſtament in writing, which bears date the 7th day of *March* 1782, and is atteſted by three witneſſes; and he thereby gave and deviſed unto his dear wife and her aſſigns, during her life, all ſuch freehold and copyhold lands which he had purchaſed, and which he was ſeiſed of in fee-ſimple, or in exchange for other lands in *Kent*; and he thereby alſo gave and deviſed in manner following; that is to ſay, "And whereas I have granted a leaſe of *Chiſlehurſt* houſe, gardens, meadows, and other lands in hand, and alſo of *Holbrookwood*, to the Honourable Mrs. *Ann Maria Blundell*, for the term of eleven years from *Lady Day* 1778, at the yearly rent of 84*l.* 1*s.*; which lands and woods were valued by *Richard Buſby* of *Chiſlehurſt*, ſteward to the Right Honourable *Thomas Townſhend*, and *James Wiffin* of *Chiſlehurſt*, my ſteward, at the yearly value of 4*l.* 1*s.* Now my will and meaning is, that in caſe ſuch of my relations as ſhall be tenant or tenants for life or lives of the *Chiſlehurſt* eſtate, by virtue of my uncle Mr. *Thomas Farrington*'s will, ſhall not moleſt the ſaid Honourable Mrs. *Ann Maria Blundell*, in the quiet poſſeſſion of the ſaid houſe and

1801.

Goodright ex dim. Earl of Buckinghamshire and Others v. Marquis of Downshire et Ux.

and lands ſo leaſed to her, and ſhall at the expiration of the ſaid leaſe grant a new leaſe of the ſaid houſe and lands to my wife Lady *Robert Bertie* for the term of eleven years, if ſhe my ſaid wife ſhall ſo long live, and renew it as often as ſhe may require, under the ſame covenants, and at the ſame rent, ſo that ſhe may enjoy it during her natural life; I do then and in that caſe give and deviſe my lands and houſes purchaſed of *William Ruſſell*, and lands purchaſed of Lord *Camden*, with the houſes thereon, and all lands that I now have or may have a right to, both freehold and copyhold, ariſing from exchange of lands, acts of Parliament, or otherwiſe, in *Kent*, deviſed to my wife for her life, to go with and be ſubject to the ſame entail, as the eſtates at *Chiſleburſt*, left to me by my uncle *Thomas Farrington*, are or may be ſubject to by virtue of his ſaid will, to take effect immediately after the deceaſe of my ſaid wife; and then and in ſuch caſe I do recommend and deſire my ſaid wife to give the furniture which now belongs to the houſe and farm to whomſoever may be living, to enjoy the *Chiſleburſt* eſtate after her deceaſe; but in caſe *Charles Townſhend*, Eſq. or ſuch of my relations as ſhall be tenant or tenants for life, or otherwiſe entitled to the *Chiſleburſt* eſtate, by virtue of the ſaid will, ſhall refuſe or neglect from time to time to grant ſuch leaſe or leaſes in manner aforeſaid, or diſturb the ſaid Honourable Mrs. *Ann Maria Blundell* or her aſſigns, or my wife or her aſſigns, in the poſſeſſion of the ſaid houſe or premiſes during her life, then and in ſuch caſe I give and deviſe to my ſaid wife, her heirs, and aſſigns for ever, all my ſaid freehold and copyhold houſes and lands, which I have before deviſed to her for her life only, and all the reſt and reſidue of my real eſtates whatſoever; and all the reſt and reſidue of my perſonal eſtate of what nature or kind ſoever or whereſoever, I give, deviſe, and bequeath, to my ſaid wife, her heirs, executors, adminiſtrators, and aſſigns, for ever."

The Honourable Mrs. *Ann Maria Blundell*, named in the will of the ſaid Lord *Robert Bertie*, was not moleſted in the quiet poſſeſſion of the houſe and premiſes, of which he had granted her a leaſe. She died on the 16th of *November* 1798, and at or before the expiration of the ſaid leaſe, the ſaid *Charles Townſhend* being then the tenant for life of the *Chiſleburſt* eſtate, by virtue of the ſaid will of the ſaid *Thomas Farrington*, granted a leaſe of the ſaid houſe and premiſes to Lady *Robert Bertie*, the widow of the ſaid Lord *Robert Bertie*, as directed by his ſaid will, under which

ſhe

GOODRIGHT ex dim. Earl of BUCKINGHAMSHIRE and Others *v.* Marquis of DOWNSHIRE et Ux.

ſhe enjoyed and had the poſſeſſion of the ſaid houſe and premiſes ſo long as ſhe thought proper.

The ſaid Lady *Robert Bertie* died on the 13th of *April* 1798, leaving *Mary*, the wife of *Arthur* Marquis of *Downſhire*, her heir according to the cuſtom of gavelkind.

The premiſes for which this ejectment was brought were part of the eſtates deviſed by the will of the ſaid *Thomas Farrington*, and the queſtion for the opinion of the Court was, Whether the leſſors of the Plaintiff or any of them were entitled to recover the poſſeſſion of the premiſes in queſtion in this action, or any part thereof? And if this Court ſhould be of opinion that the leſſors of the Plaintiff, or any of them, were entitled to recover, the verdict was to be entered according to ſuch opinion: but if the Court ſhould be of opinion that the leſſors of the Plaintiff, or any of them, were not entitled to recover, then a verdict was to be entered for the Defendants.

This caſe was argued three times; 1ſt, In *Eaſter* Term laſt by *Shepherd* Serjt. for the Plaintiffs, and *Beſt* Serjt. for the Defendants; 2dly, By *Lens* Serjt. for the former, and *Bayley* Serjt. for the latter; and now again in this term by *Shepherd* Serjt. for the Plaintiffs, and *Williams* Serjt. for the Defendants.

Arguments for the Plaintiffs.—Admitting that the reſiduary clauſe in Lord *Robert Bertie*'s will be ſufficiently comprehenſive to carry the ultimate reverſion of the eſtates deviſed by Mr. *Farrington*'s will to which he was entitled, yet if it appear to have been his intention not to include ſuch reverſion in the reſiduary clauſe, it will not paſs under that clauſe, though no expreſs mention was made of it in the former part of the will. *Strong* v. *Teatt*, 2 *Bur.* 912. 1 *Bl.* 200. The queſtion therefore turns upon the intention of the teſtator, as it is to be collected from the ſituation of the parties, and from the will. From the ſituation of theſe parties, and the intereſt of Lord *Robert Bertie*, it appears not only that he meant to give this reverſion, but the reaſon is plain why he did ſo. Lord *Robert Bertie* had a power over the whole eſtate for his life; but in caſe he died without children, his whole intereſt (excluſive of his ſhare in the ultimate reverſion) became extinct. The next in remainder was Mr. *C. Townſhend*, to whom the eſtate was limited in ſtrict ſettlement. The object therefore of Lord *Robert Bertie* was after his death to ſecure to Mrs. *Blundell* the quiet enjoyment of the houſe and lands at *Chiſleburſt* during the continuance of the leaſe granted by him, and a renewal of the leaſe upon the ſame terms on the expiration thereof, to his wife for her life. In order therefore to induce Mr. *C. Townſhend* and his iſſue, and the heirs of Mr. *Farrington* (of which Lord *Robert Bertie* was but one) to acquieſce in theſe views, he declares, that provided they do ſo, all the lands over which he has a controul, and which he has deviſed to his wife for life, ſhall go in the ſame line as the eſtates left to him by Mr. *Farrington*'s will, to take effect immediately after the deceaſe of his wife. And though indeed he uſes the expreſſion "ſubject to the ſame entail," yet the meaning of that expreſſion muſt be underſtood to be, that they ſhall be ſubject to the ſame ſort of limitation, in which caſe the ultimate limitation to the heirs of Mr. *Farrington* will be included; and Lord *Robert Bertie*'s ſhare of the reverſion, inſtead of going to his wife, will go among the heirs of Mr. *Farrington*. The manifeſt intention of the teſtator appears to have been to ſecure to his wife for her life every thing over which he had no control; and in order to effectuate that intention, he was willing to give every thing over which he had a control to the perſons in whoſe power it might be, as entitled to the *Farrington* eſtates, to contravene his intention in favour of his wife. This appears ſtrongly from the recommendation to his wife to give the furniture belonging to the *Chiſleburſt* houſe to the perſon who ſhould be living to enjoy the houſe after her deceaſe, provided ſhe were permitted to continue in it during her life. It can ſcarcely be ſuppoſed to have been the intention of the teſtator to give this remote reverſion to his wife by the reſiduary clauſe, when the manifeſt object of the will appears to have been, to ſecure a proviſion to his wife for her life; and when it is conſidered that the lands which he had himſelf purchaſed are only given to her in fee, in caſe ſhe ſhould not be permitted to enjoy the *Farrington* eſtate for her life. Beſides, conſidering that Mr. *C. Townſhend*, who was the next in the entail, was only thirty-ſix years of age, whereas Lady *Robert Bertie* was ſixty-four (*a*), the probability was, that ſhe would never enjoy the reverſion during her life. It ſeems indeed to have been decidedly the teſtator's wiſh, that the *Farrington* eſtate and his own eſtates ſhould

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(*a*) The reſpective ages of Mr. *Charles Townſhend* and Lady *Robert Bertie* at the date of Lord *Robert Bertie*'s will, together with ſome other facts, were added to the caſe after the ſecond argument at the deſire of the Court, and are ſtated by Lord *Alvanley* Ch. J. in the beginning of the judgment.

ſhould be enjoyed together, and go in the ſame line, which object would be altogether defeated, by holding that the ultimate reverſion in the former paſſed to Lady *Robert Bertie* under the reſiduary clauſe, while the latter are expreſsly limited to follow the entail of the *Farrington* eſtate, and muſt therefore go to the heirs of Mr. *Farrington*. If then it appear to have been the intention of the teſtator that the reverſion ſhould go according to the limitation of the *Farrington* eſtate, the words in the will are fully ſufficient to effect that purpoſe. For the teſtator firſt gives to his wife for life all the eſtates of which he was ſeized in fee-ſimple; and he afterwards directs that all lands in *Kent*, both freehold and copyhold, ariſing from exchange of lands, acts of Parliament, *or otherwiſe* deviſed to his wife for life, ſhall go with and be ſubject to the ſame entail as the *Farrington* eſtates. Now the words "ſeiſed in fee-ſimple," in the firſt deviſe to his wife for life, are ſufficient to include the reverſion; and the words "or otherwiſe," in the ſubſequent limitation, will alſo include the ſame whether it came to the teſtator by deſcent from Mr. *Farrington*, or by the deviſe in his will; and the words "ſhall go with," will carry the limitation to the heirs of Mr. *Farrington*, even ſuppoſing the words "ſubject to the ſame entail" to be inadequate to that purpoſe. It is not neceſſary to contend that the right heirs of Mr. *Farrington* would take as purchaſers; for though they ſhould be entitled to take by deſcent, yet the mention of them in the will as deviſees, is ſufficient to except the eſtate deviſed out of the reſiduary clauſe. *Smith* d. *Davis* v. *Saunders*, 2 *Bl.* 736. and *Ameſbury* v. *Brown*, *coram* Lord *Hardwicke*, cit. *ibid.* If however it can be ſuppoſed that the reverſion was altogether out of the contemplation of the teſtator, then it neither paſſed by the ſpecial limitations or by the reſiduary clauſe; and it muſt therefore deſcend to the leſſors of the Plaintiff as the heirs of Mr. *Farrington*.

Arguments for the Defendants.—Unleſs this reverſion can be held to paſs by implication under the limitations in the former part of the will, it will paſs under the reſiduary deviſe to Lady *Robert Bertie*; for although this particular reverſion may not have been in the contemplation of the teſtator Lord *Robert Bertie*, yet as it appears to have been his intention that every thing to which he was entitled ſhould paſs to his wife, and the words are large enough to include the reverſion, it will accordingly paſs. *Freeman* v. *The Duke of Chandos*, *Cowp.* 360. 363. Suppoſing Lord *Robert Bertie* not to have been aware that he was entitled to deviſe this reverſion, it clearly would not paſs under the ſpecial limitations in his will; on the other hand, ſuppoſing him to have been aware that he was entitled to deviſe it, he has not uſed expreſſions calculated to convey it to the heirs of Mr. *Farrington*; for the limitation of the ultimate reverſion in Mr. *Farrington*'s will had no operation, ſince that will only directed that the reverſion ſhould go to thoſe very perſons who would take it by deſcent. Mr. *Farrington*'s will therefore created nothing but eſtates for life and eſtates in tail, conſequently when Lord *Robert Bertie* directs that the reverſion ſhall go according to the entail in Mr. *Farrington*'s will, that deviſe can extend no farther than the eſtates created by the will to which he alludes. There is nothing upon the face of Lord *Robert Bertie*'s will to ſhew that he had this reverſion in contemplation, for though the words "ſeiſed in fee ſimple" in the firſt limitation to his wife for life are ſufficient to include the reverſion, provided an intention to paſs it be manifeſt, yet thoſe words ſeem rather to deſcribe eſtates in poſſeſſion; and if the reverſion was not included in the firſt limitation, it cannot be included in the ſecond, which is expreſsly confined to the eſtates before deviſed for life to Lady *Robert Bertie*. In the next place, it does not appear to have been in the contemplation of Lord *Robert Bertie* that the heirs of Mr. *Farrington* could have it in their power to moleſt his wife, but only the perſons claiming under the will; it is not therefore to be preſumed that any thing was given as a reward for abſtaining from ſuch moleſtation, to any perſons but thoſe whom he thought entitled to moleſt her; for Lord *Robert Bertie* ſpeaks only "of tenant or tenants for life, or otherwiſe entitled to the ſaid *Chiſlehurſt* eſtate by virtue of the ſaid will." It has been contended that the teſtator muſt have intended to deviſe the reverſion to the heirs of Mr. *Farrington*, becauſe otherwiſe the lands which he had himſelf purchaſed would go in a different channel; but that is not ſo, for under the word "entail" neither the one nor the other deſcription of lands were limited to any perſons but the lineal deſcendants of Mr. *C. Townſend*. It is not to be preſumed that the teſtator was ignorant of the meaning of the word "entail," but that he knew the law as well as any other perſon. *Purefoy* v. *Rogers*, 2 *Saund.* 384. If the deviſe of the reverſion be extended to the right heirs of Mr. *Farrington*, yet it cannot go with and be ſubject to the ſame entail, for in one caſe the heirs of Mr. *Farrington* would take a different

1801.

Goodright ex dim. Earl of Buckinghamshire and Others *v.* Marquis of Downshire et Ux.

ſpecies of eſtate from that which they would take in the other. The *Farrington* eſtate they would take by deſcent, the reverſion they muſt take by purchaſe. The *Farrington* eſtate if it deſcended among daughters might be held in coparcenary, whereas the reverſion muſt be held by them in joint-tenancy or tenancy in common. The former would be held in gavelkind, which could not be the caſe with the latter, that ſpecies of tenure only applying to lands coming by deſcent. From the words uſed in the deviſe to the perſons entitled to the *Farrington* eſtate it further appears, that the teſtator could not intend to include a remote reverſion, ſince he directs that *immediately* upon the deceaſe of his wife the lands ſhould go to the deviſees, which ſhews that ſuch lands were intended as might paſs all together, whereas reverſionary lands might or might not be in a ſtate to paſs according to circumſtances. As to the directions reſpecting the furniture it might be reaſonable for the teſtator to adviſe that his wife ſhould give that at her deceaſe to the perſons who would then be entitled to the eſtates in poſſeſſion, the furniture being of a periſhable nature, and not likely to laſt till the reverſion in the lands ſhould fall in; but the reverſion itſelf being a permanent thing, there was good reaſon for including it in the reſiduary deviſe to Lady *R. Bertie*, ſince her heirs might enjoy it though ſhe herſelf ſhould not ſurvive the perſons entitled to the particular eſtates. The Court therefore cannot hold that the ultimate reverſion paſſed to the heirs of Mr. *Farrington* under Lord *R. Bertie*'s will, without doing violence to the expreſſions of that will, and poſſibly defeating the intention of the teſtator.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord Alvanley Ch. J. After this caſe had been argued the ſecond time at the bar, the Court expreſſed a deſire to be informed of the ages of Lady *Robert Bertie* and Mr. *Charles Townſhend* at the time when Lord *Robert Bertie* made his will, and alſo whether Lord *Robert Bertie* had any eſtates in poſſeſſion except his eſtates in *Kent*. This was done with a view to aſcertain the intent of the teſtator reſpecting the annexation of the eſtates, and the effect of the reſiduary clauſe. It had been argued that Mr. *Charles Townſhend* was ſo much younger than Lady *Robert Bertie*, that the teſtator could never have thought of guarding his wife againſt any thing which was to happen after the death of Mr. *C. Townſhend*

GOODRIGHT ex dim. Earl of BUCKINGHAMSHIRE and Others *v.* Marquis of DOWNSHIRE et Ux.

without iſſue; but it now appears that at the time when he made his will Lady *Robert Bertie* was 64 years of age and Mr. *C. Townſhend* 49, and unmarried. There was therefore only 15 years difference between their ages; and as Mr. *C. Townſhend* had no iſſue, the poſſibility of the event taking place was not very remote. It alſo appears that the teſtator was ſeiſed of a fee farm rent in *Middleſex* of about 16*l. per annum*; his right to which, although diſputed, and the arrears of rent withheld for four years before his death, was conſtantly aſſerted by him. This muſt therefore be taken to be a ſubject upon which the reſiduary clauſe might operate out of the county of *Kent*. The queſtion then, and the only queſtion in this caſe is, Whether the one third of a moiety of the eſtates deviſed by *Thomas Farrington* to his right heirs (but which notwithſtanding certainly deſcended upon them), and of which right heirs Lord *Robert Bertie* was one, paſſed by the reſiduary clauſe of Lord *Robert Bertie*'s will? The principles upon which this caſe is to be determined were not diſputed. It was admitted on the part of the leſſors of the Plaintiff, that it was incumbent upon them to prove by neceſſary conſequence ariſing from the other parts of the will, that the reſiduary clauſe had not the operation which according to the rules of conſtruction it was allowed to have, namely, that of carrying every real intereſt of every kind whatſoever, whether known or unknown to the teſtator, provided it were not manifeſtly excluded. It was admitted that it was neceſſary to ſhew that it would be inconſiſtent with the general intent of the teſtator and the particular proviſions of the will to impute to the teſtator any intention to convey the one third of a moiety of the eſtate of which he was ſeiſed as right heir of Mr. *Farrington*; and that it was not neceſſary that the teſtator's mind ſhould be active in including the ſubject matter, but that even if he did not know that he had it, ſtill it would paſs, provided he did not mean to exclude it. Looking therefore at the proviſions of this will we are to conſider, not whether the teſtator had not this particular eſtate in contemplation, but whether he meant that the reſiduary clauſe ſhould not have that effect which the law attributes to it. This is the principle upon which analogous caſes have been determined. Of theſe I will preſently mention two or three. I will ſtate the governing principle of thoſe caſes, and the grounds upon which it was held in one caſe that the teſtator did not intend that the lands ſhould paſs, and in another that they did paſs; and by

1801.
Goodright ex dim. Earl of Buckinghamshire and Others v. Marquis of Downshire et Ux.

comparing the grounds of theſe caſes with the caſe now before the Court, I will endeavour to ſhew how far they are analogous in the conſtruction of this teſtator's intent, and whether any one of them will enable us to decide that the lands in queſtion were not included in the reſiduary clauſe. In order to prove that the lands in queſtion were not included, much argument was uſed to ſhew that the effect of this will was to annex the purchaſed eſtates to the ſettled eſtates, not only during the continuance of the eſtate tail, but alſo when the ſettled eſtates ſhould come into the hands of thoſe who ſhould be entitled to the reverſion in fee. For the ſake of argument, I will ſuppoſe this to have been the intent of the teſtator, it not being a very improbable intent, conſidering that the general object of the teſtator was to ſecure at all events to his wife that part of the ſettled eſtates over which he had no power, by holding out to thoſe entitled to the ſettled eſtates that they ſhould have the enjoyment of his unſettled eſtates after the death of his wife. Then taking this to be the caſe, it is ſaid to be a neceſſary conſequence of that intent, that thoſe perſons who claimed the purchaſed eſtates under him would alſo be entitled under him to one-third of a moiety of the reverſion of the ſettled eſtates, of which he was ſeiſed as heir at law of Mr. *Farrington*. But *non conſtat* that the teſtator knew he was ſeiſed of this eſtate at the time when he made his will, and what he would have done had it been ſtated to him at that time that he was ſo ſeiſed, I will not allow myſelf, ſitting as a judge, to ſpeculate, becauſe I conſider that to be the moſt dangerous mode of conſtruction which can poſſibly be adopted. There is indeed nothing abſurd in ſuppoſing that his object was to annex the two eſtates together, provided his wife ſhould not be moleſted: and taking it for granted that this was his object, it has been argued, that it would be inconſiſtent with that object to ſuppoſe that the teſtator intended any perſon to take this third of a moiety, except thoſe who ſhould be the heirs at law of Mr. *Farrington*. But this argument proceeds upon the ſuppoſition that the teſtator knew that he was one of the heirs of Mr. *Farrington*. Suppoſing however that the teſtator had been the ſole heir of Mr. *Farrington*, this circumſtance would not be ſufficient to reſtrain the operation of the reſiduary clauſe. In that caſe the annexation of the two eſtates would have been unneceſſary to guard his wife from moleſtation after the expiration of the entail: for if he were entitled to the reverſion, his wife would derive the beſt ſecurity for her quiet enjoyment, by taking the reverſion under the reſiduary clauſe. We are therefore of opinion, that if the teſtator had been the ſole heir of Mr. *Farrington*, the reſiduary words would have been ſufficient to carry the eſtate. The caſe then would have amounted to this, that the teſtator at the time when he made his will was ſeiſed of an eſtate, of which he was not cognizant; and that it is not inconſiſtent with the reſt of his will to permit that eſtate to be included in the reſiduary clauſe. I will now ſtate the caſes from which it appears to me that we are not at liberty to exclude any real intereſt from the operation of this reſiduary clauſe. The firſt caſe which I ſhall mention is that of *Strong* v. *Teatt*, in which it was held that the reverſion was not included in the reſiduary clauſe. Lord *Mansfield*, in giving his judgment, which was afterwards confirmed in the Houſe of Lords, ſtates the queſtion to be, "Whether by this ſweeping reſiduary clauſe the teſtator intended to deviſe the reverſion?" He then ſays, "The generality of the expreſſion, 'and alſo all other the lands, tenements, and hereditaments, in the ſaid counties of *Tyrone* and *Meath*, or either of them, whereof I am ſeiſed in fee-ſimple, or of which any other perſon is ſeiſed in truſt for me, together with their and every of their appurtenances,' if unreſtrained and unqualified by any other words, would carry all the teſtator's eſtate in poſſeſſion, reverſion or remainder. But theſe general words may, by other words and expreſſions in the will, be reſtrained to any or either of theſe: and it is the ſame thing whether it be directly expreſſed, or clearly and plainly to be collected from the will. Now" he obſerves, "here are plain expreſſions, which are fully ſufficient to ſhew that the teſtator did not intend to deviſe the reverſion of this ſettled eſtate." Then, after ſtating the numerous inconſiſtencies which would ariſe from ſuppoſing that the reverſion was intended to paſs, he ſays, "The conſequence is too manifeſt to bear an argument: if it be but attended to what abſurdities muſt follow from conſtruing the reverſion to paſs;" and after commenting upon the particular expreſſions of the will, and the deſcription of locality in the reſiduary clauſe, he adds, "But theſe minute and critical obſervations ſerve only to weaken the argument; ſince there are in this will ſufficient general words, which expreſly and clearly ſhew that the teſtator had no intention to include the reverſion of the ſettled eſtate in his will, as much as if he had uſed particular words and expreſſions

1801.

Goodright ex dim. Earl of Buckinghamshire and Others v. Marquis of Downshire et Ux.

expreſſions to declare it directly and explicitly;" and concludes, "It appears clearly upon the very words of the whole will taken together, that there can be no doubt of the teſtator's intention, that the reverſion of the ſettled eſtate ſhould not be included in it, but only the lands which he had in poſſeſſion." Mr. Juſtice *Wilmot* wondered how any one could entertain any doubt upon the queſtion; it being as clear, he ſaid, upon the whole tenor and complexion of the will as the ſtrongeſt expreſs negative clauſe could make it. The Court therefore did not proceed upon the argument of preſumption of an intention to exclude, but upon the inconſiſtencies and abſurdities which would ariſe from including the eſtate in queſtion. In the next caſe which I ſhall ſtate, it was held that the eſtate in queſtion was included in the reſiduary clauſe, and that inference and preſumption were not ſufficient to exclude it. That was the caſe of *Freeman* v. *The Duke of Chandos*. As far as inference, conjecture, and ſuppoſition could avail, there was every reaſon for holding that the eſtate was intended to be included; but there was no inconſiſtency in holding the contrary. The Court certified, "that though the remote reverſion might not be particularly thought of, yet the general words were ſufficient to include it, and the intention of the parties was to include all. Therefore they were of opinion that the reverſion in fee of one undivided ſeventh part of the eſtate in queſtion did paſs by the act of Parliament in the pleadings mentioned to the Defendant the Duke of *Chandos*." From this caſe I collect, that the ſame principle which induced the Court in *Strong* v. *Teatt* to hold the eſtate excluded, here prevailed to induce them to hold it included: there being no inconſiſtency in permitting the words to have their legal effect, the Court would not by ſurmiſe contract their operation. There is another caſe which is not immaterial in the preſent conſideration, namely, that of *Smith* d. *Davis* v. *Saunders*, in which a principle was laid down upon which we muſt decide this caſe, *viz.* that a reſiduary clauſe will extend to every latent reverſion which the teſtator may have in him, unleſs it be expreſsly excluded by deviſe to ſome other perſon, though indeed if ſuch latter deviſe be to the teſtator's own right heirs, it will equally operate as an excluſion of the reſiduary deviſe, though the heirs cannot take as purchaſers. The queſtion therefore recurs to this, Whether it appears from any particular clauſe of this will, or from the general intent of the teſtator manifeſted in the will, that it would be inconſiſtent

1801.

Goodright ex dim. Earl of Buckinghamshire and Others *v.* Marquis of Downshire et Ux.

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Per Curiam,

Let the *Poſtea* be delivered to the Defendants.

END OF MICHAELMAS TERM.

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Goodtitle ex dim. Earl of Buckinghamshire and Others v. Marquis of Downshire et Ux.

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END OF MICHAELMAS TERM.

AN
INDEX
TO THE
PRINCIPAL MATTERS
Contained in this Volume.

A

ABATEMENT.

1. A writ in debt may be abated in part and ſtand good for the remainder. *Powell* v. *Fullerton. E.* 41 *Geo.* 3. *Page* 420

2. If a plea in abatement contain matter which is in part abatement of the writ only, but concludes with a prayer that the whole writ may be abated, the court may abate ſo much of the writ as the matter pleaded applies to. *ib.* *ib.*

ACCOMPLICE.

See LARCENY.

ACTION ON THE CASE.

In an action for maliciouſly holding to bail, it is not ſufficient to prove, that the writ was ſued out after payment of the debt, if the circumſtances afford no inference of malice; but in ſuch caſe evidence of actual malice muſt be given. *Gibſon* v. *Chaters*, *E.* 40 *Geo.* 3. 129

ADMINISTRATOR,

See EXECUTOR and ADMINISTRATOR.

AFFIDAVIT TO HOLD TO BAIL.

See PRACTICE. 18, 19.

1. If an affidavit to hold to bail ſtate the circumſtances under which a debt accrued, and conclude "by reaſon whereof the Defendant ſtands indebted in £. which he hath refuſed and ſtill refuſeth to pay," it is bad. *Fowler* v. *Morton*, *M.* 40 *Geo.* 3. *Page* 48

2. If ſuch an affidavit negative a tender "in notes of the Bank of England *payable on demand*," it is a ſufficient compliance with the 37 *Geo.* 3. *c.* 45. *ſ.* 9. though the words of that act are, "*expreſſed* to be payable on demand." *ib.* *ib.*

3. If a Plaintiff executor hold a Defendant to bail upon an affidavit ſtating the debt to be due, "as appears by the teſtator's books" but omitting to add, "and which the deponent believes to be true," the court of *C. B.* will allow the Plaintiff to ſwear to his belief in a ſupplemental affidavit. *Garnham executrix*, v. *Hammond*, *M.* 41 *Geo.* 3. 298

4. If an affidavit to hold to bail made by the Plaintiff's clerk expreſly negative a tender in bank notes, it is bad. *Smith* v. *Tyſon*, *M.* 41 *Geo.* 3. 339
Hammerſley v. *Mitchell*, *E.* 41 *Geo.* 3. *S. P.* 389

5. In an affidavit to hold to bail the Plaintiff depoſed that, at the time of the aſſignment thereinafter mentioned, the Defendant was

indebted to him on a bill of exchange, and that he afterwards aſſigned the debt by indenture to *A. B. C.* and *D.* in truſt: *A* then depoſed, that, at the time of the affidavit being made, the Defendant was indebted to them *A. B. C.* and *D.* as ſuch aſſignees and truſtees as aforeſaid. Held that the affidavit was inſufficient, becauſe it did not deny that the debt had been ſatisfied to the Plaintiff between the aſſignment and the time of the affidavit being made. *Mann* v. *Sheriff. H.* 41 *Geo.* 3. *Page* 355

6. But a ſupplemental affidavit was allowed. *ib.* *ib.*

7. A perſon employed in London as agent to one reſiding at a diſtance in the country, with a power of attorney to collect his debts, may make an affidavit of debt, poſitively denying any tender in bank notes. *Chatterly* v. *Finck, E.* 41 *Geo.* 3. 390

8. An affidavit of debt, made by one of three partners, denying any tender in bank notes to himſelf or to either of his partners to the beſt of his knowledge and belief is ſufficient. *Stacey* v. *Federici, E.* 41 *Geo.* 3. 390

9. An affidavit to hold to bail in which a tender in bank notes is negatived by the Plaintiff's clerk alone, then reſident in London is inſufficient, if the Plaintiff be alſo reſident in London, though the debt aroſe upon a bill tranſaction of which the clerk had the ſole management. *Bolt* v. *Miller, E.* 41 *Geo.* 3. 420

10. If an affidavit to hold to bail be made by a perſon *pimâ facie* incompetent to make it. *Qu.* Whether circumſtances proving him to be competent can be ſhewn by affidavit for cauſe againſt a rule for diſcharging the Defendant on a common appearance? *ib.*

11. The court will not ſet aſide proceedings, and order the bail-bond to be delivered up, becauſe a defendant has been arreſted on a ſpecial *capias* in which, as well as in the affidavit to hold to bail, the initials only of his chriſtian name were inſerted. *Howell* v. *Coleman, T.* 41 *Geo.* 3. 466.

12. Affidavit to hold to bail made by *A.* in reſpect of a debt due to *B.* before his diſcharge, under an inſolvent act, whereby *B.*'s eſtate becomes veſted in the clerk of the peace, and negativing a tender in bank notes to the knowledge or belief of *A.* held ſufficient, the court allowing *A.* and *B.*, by a ſubſequent affidavit, to ſhew that *A.* uſually tranſacted *B*'s buſineſs when out of town, and that at the time when the affidavit to hold to bail was made, *B.* was out of town, and that an immediate arreſt was neceſſary, as the Defendant was about to ſail on a voyage. *Lawſon* v. *M'Donald, M.* 42 *Geo.* 3. *Page* 590

AGENT.

See AFFIDAVIT TO HOLD TO BAIL.

1. *A.* entruſted *B.* with goods to ſell in India, agreeing to take back from *B.* what he ſhould not be able to ſell, and allowing him what he ſhould obtain beyond a certain price, with liberty to ſell them for what he could get if he could not obtain that price. *B.* not being able to ſell the goods in India himſelf, left them with an agent to be diſpoſed of by him, directing the agent to remit the money to him (*B.*) in England. Held that *A.* could not maintain trover againſt *B.* for the goods. *Bromley* v. *Coxwell, E.* 41 *Geo.* 3. 438

2. And it ſeems that he could not maintain any action. *ib.* *ib.*

AGREEMENT.

See ASSUMPSIT, 2.
PENALTY, 1.
STAMPS, 1, 2, 3, 4.
TROVER, 2.

1. *A.* being tenant to *B.* under a leaſe containing covenants, by which the former was bound to fetch 75 buſhels of coals from *Pool* yearly, and deliver them at the manſion houſe of the latter, and alſo to ſupply him with as much good wheat as he ſhould want in his family at 5 ſhillings per buſhel, it was agreed between them that the leaſe ſhould be ſurrendered up and a new one granted, omitting the above covenants. A new leaſe was accordingly executed, and at the ſame time an agreement was entered into, whereby *A.* agreed with *B.* that he would fetch and bring to the dwelling-houſe of *B.*, his heirs and aſſigns 75 buſhels of coals yearly, for 12 years, (the term of the new leaſe,) and yearly ſupply *B.*, his heirs and aſſigns, with as much good wheat as he ſhould want in

his family at 5 ſhillings per buſhel. *B.* having parted with his reverſion in the farm and alſo quitted the manſion houſe, in which he reſided at the time when the agreement was made: Held that he was not entitled to maintain an action againſt *A.* for refuſing to deliver the wheat at the ſtipulated price; that the agreement being entire muſt receive one uniform conſtruction, and as it was clearly local in reſpect of the delivery of coals, it could not be deemed perſonal with reſpect to the wheat. *Coker* v. *Guy*, *M.* 42 *Geo.* 3. *Page* 565

2. Held alſo that no parol evidence could be admitted to explain the agreement, there being no latent ambiguity. *ib.* *ib.*

AID-PRAYER.

1. Aid-prayer is a dilatory plea within the 4. *Ann. c.* 16. and muſt be verified by affidavit. *Onſlow* v. *Smith*, *E.* 41 *Geo.* 3. 384

2. If the tenant in a writ of right pray aid after a general imparlance, it is a good cauſe of demurrer, and the court will give judgment thereupon, that the tenant anſwer alone. *ib.* *ib.*

ALIEN.

The Defendant, an alien within the terms of the 38 *Geo.* 3. *c.* 50. *ſ.* 9. (which exempts from arreſt for debts contracted abroad, aliens reſiding in this country in conſequence of a revolution in their own,) having entered into an agreement with the Plaintiff in a foreign country, the latter, in purſuance of the agreement, laid out money in England; after which the parties came to an adjuſtment in England, and the Defendant acknowledged the debt. The Defendant, having been holden to bail for money laid out by the Plaintiff in England, and on an account ſtated in England, diſcloſed the above circumſtances by affidavit, whereupon the court diſcharged him on a common appearance. *Sinclair* v. *Charles Philippe* Monſieur *de France*, *H.* 41 *Geo.* 3. 363

AMENDMENT,

See COMMON RECOVERY.
FINE.

1. *A. B.* having been arreſted on a *capias* ſued out againſt him by the name of *B. C*; a bail-bond was given, by which *A. B.*, arreſted by the name of *B. C.*, became bound, conditioned for the appearance of *A. B.* arreſted by the name of *B. C.* The affidavit to hold to bail named the Defendant properly *A. B.* The court amended the *capias* and return (but without prejudice to the Sheriff), and rejected an application by the bail to ſet aſide the bail-bond. *Stevenſon* v. *Danvers*. *H.* 40 *Geo.* 3. *Page* 109

2. A *ſcire facias* againſt bail in error may be amended by the record of the recogniſance. *Perkins* v. *Petit*. *Trin.* 40 *Geo*, 3. 275

3. A *fieri facias*, being made returnable on a *K. B.* return day inſtead of a *C. B.* return day, was amended by the award of execution on the roll. *Atkinſon* v. *Newton*, *M.* 41 *Geo.* 3. 336

ANNUITY.

1. At the time of executing an annuity-deed, one *R. W.*, the agent of *I. C.*, the grantee, entered into an agreement for redemption, beginning thus: "Memorandum, I undertake and agree &c." and concluding, "Witneſs my hand, *R. W.* agent for *I. C.*;" The memorial ſtated that *I. C.* entered into the agreement by *R. W.* his agent, and that it was witneſſed by *R. W.*: Held that the memorandum was ſufficient. *Cator* v. *Hoſte*, *M.* 42 *Geo.* 3. 557

2. If in the deed ſecuring an annuity, it be declared that the judgment, to be obtained under a warrant of attorney given at the ſame time, ſhall be only a collateral ſecurity for the regular payment of the annuity, and that no execution ſhall iſſue thereon till default made in the payment for 14 days, and the memorial does not notice the above declaration, and in ſetting forth the warrant of attorney, only ſtates generally that "ſuch warrant of attorney was executed for the better ſecuring the payment of the annuity, as in the above-ſtated deed is particularly mentioned," the court will ſet aſide the annuity for ſuch defect in the memorial. *Cunningham* v. *Mackenzie*, *M.* 42 *Geo.* 3. 598

ARBITRATION.

1. If *A.* and *B.* in conſideration of a ſum of money paid by one to the other, enter into partnerſhip, and covenant, in caſe of a diſſolution of the partnerſhip, to ſubmit all matters relating thereto to arbitration; the arbitrators are not thereby authorized to determine whether any part of the ſum of money which was the conſideration of the partnerſhip ſhall be refunded. *Tatterſall* v. *Groote*, *E.* 40 *Geo.* 3. *Page* 131

2. It ſeems that no action can be maintained for refuſing to nominate an arbitrator in purſuance of a covenant to refer matters to arbitration. *ib.* *ib.*

3. If a debt, ariſing out of an illegal tranſaction, due from one of two partners to the other, be referred, together with other cauſes of diſpute, to an arbitrator, who awards a ſum due from one partner to the other, expreſsly on account of ſuch debt, the Court will ſet aſide that part of the award. *Aubert* v. *Maze*, *H.* 41 *Geo.* 3. 371

4. If a bond of ſubmiſſion to arbitration between the truſtee of a wife and her huſband recite, that a ſuit for ſeparation has been inſtituted between the huſband and wife in the Commons, and that, in order to put an end to any conteſt about the terms of ſeparation, it had been agreed that all matters ſhould be referred to *I. S.*, and either of the parties ſhould be "at liberty to apply to *the Court* to make the *award* a rule of Court;" ſuch ſubmiſſion may be made a rule of the Court of Common Pleas under *St.* 9 & 10 *Will.* 3. *Soilleux* v. *Herbſt*, *E.* 41. *Geo.* 3. 444

ARREST,

See AFFIDAVIT TO HOLD TO BAIL, 11.
PRACTICE, 27.
PROCESS. 2.

ASSAULT,

See DAMAGES, 1.

ASSIGNMENT,

See DEED, 1.

ASSUMPSIT,

See MONEY HAD AND RECEIVED.
PLEADING, 7, 8.

1. *A.* declared againſt *B.* and his wife as adminiſtratrix of *C.* deceaſed; "for that whereas *C.* died inteſtate, poſſeſſed of South Sea ſtock, which ſhe held in truſt for *A.* and upon which certain dividends were due; in conſideration that *A.* at his own expence would procure adminiſtration to be granted to the wife of *B.* as next of kin to *C.*, and would furniſh evidence to enable *B.* and his wife to receive the dividends; *B.*, and his wife as ſuch adminiſtratrix promiſed to pay over to *A.* the amount of the dividends when received:" Held that the conſideration ſtated was inſufficient to ſupport the promiſe. *Parker* v. *Baylis et Ux.* *H.* 40 *Geo.* 3. *Page* 73

2. An agreement between parties to a ſuit in chancery, binding themſelves, their executors, and adminiſtrators, made an order of that Court and acted upon therein as ſuch, may be the ground of an *aſſumpſit* at law. *Smith* v. *Whalley*, *T.* 41 *Geo.* 3. 482

ATTACHMENT,

See BAIL, 8, 9.
PRACTICE, 3.

ATTESTING WITNESS,

See EVIDENCE, 3.

ATTORNEY,

See BAIL, 11.
COSTS, 2.
COURTS, 1.

A Plaintiff may ſue out execution by a different attorney from the attorney in the cauſe, without obtaining an order of court for changing the attorney. *Tipping* v. *Johnſon*, *H.* 41 *Geo.* 3. 357

ATTORNEY'S BILL,

See EVIDENCE. 4, 5.

1. Delivery of an attorney's bill at the *compting houſe* of his client, one month before the commencement of an action upon the bill, is not a good delivery within the 2 *Geo.* 2. *c.* 23. *Hill* v. *Humphreys*, *H.* 41 *Geo.* 3. 343

2. If an attorney introduce into his bill certain items connected with his profeſſional capacity, though not immediately within the terms of the 2 *Geo.* 2. *c.* 23. and in an action

action upon the bill fail, becauſe it was not delivered according to the directions of the ſtatute he muſt fail altogether, and will not be allowed to recover for ſuch items only. *Hill* v. *Humphreys*, *H.* 41 *Geo.* 3. *Page* 343

3. *Qu.* Whether the ſame rule would not prevail, if ſuch items were not at all connected with his profeſſional capacity? *id. ib.*

AUTHORITY,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.
OFFICER, 1, 2.

1. The crown by letters patent granted to the maſter and wardens of the corporation of bakers (there being four wardens) by themſelves and their deputy or deputies full power to overlook and correct the trade of baking: Held that the maſter and one warden could not juſtify entering the houſe of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of perſons to whom the power was given; and if they acted as deputies, they were bound to ſhew that they were appointed by the majority. *Cook* v. *Loveland*, *M.* 40 *Geo.* 3. 31

2. *Qu.* Whether an authority to enter the houſe of a perſon of a particular trade, be incident to an authority given by charter to overlook and correct that trade? *id.* 33

3. Alſo, whether the crown have power to grant ſuch authority? *ib.*

B.

BAIL,

See AMENDMENT, 2.
ALIEN, 1.
PRACTICE, 3. 5. 17, 18, 19. 23. 27.
PLEADING, 1.
VARIANCE, 3.

1. In *C. B.* two days' notice of juſtification muſt be given whether the bail originally put in, or added bail be brought up. *Nation* v. *Barrett*. *M.* 40 *Geo.* 3. *in notis.* 30

2. *Secus* in *K. B.* *Wright* v. *Ley*. *H.* 15 *Geo.* 3. *B. R.* 31

3. It is not a ſufficient ground for rejecting a perſon as bail, that he is deſcribed to be "of *A.* in the county of *B.* *gaol-keeper.*" *Faulkner* v. *Wiſe*, *E.* 40 *Geo.* 3. 150

4. The court will not diſcharge a Defendant on common appearance, on the ground of his having obtained his certificate as a bankrupt, and of the debt being thereby barred, if the validity of the certificate is meant to be diſputed. *Stacey* v. *Federici*, *E.* 41 *Geo.* 3. *Page* 390

5. If a Defendant in error (the Plaintiff in the action), upon judgment being affirmed, take in execution the body of the Plaintiff in error, for the debt damages and coſts in error, he does not thereby diſcharge the bail in error, but may ſue them upon their recogniſance. *Perkins* v. *Petit and Gale*, *E.* 41 *Geo.* 3. 440

6. A recogniſance entered into by the bail in error without the principal, is good. *Dixon* v. *Dixon*, *E.* 41 *Geo.* 3. 443

7. If on a bond debt, double the ſum ſecured by the bond be the ſum for which the bail bind themſelves in the recogniſance in error, it is ſufficient, though a further ſum be due for intereſt and coſts, and nominal damages have been recovered. *ib.*

8. If bail be put in with the filazer of the county in which the Defendant is arreſted on a *teſtatum capias*, the bail may be treated as a nullity and an attachment iſſue. *Clempſon* v. *Knox*, *M.* 42 *Geo.* 3. 516

9. But if the Plaintiff appear to have been aware that the bail were actually put in, though with the wrong filazer, the court will relieve againſt the attachment. *id. ib.*

10. An indorſer of a bill of exchange may be bail for the drawer, in an action againſt him on the ſame bill. *Harris* v. *Manley*, *M.* 42 *Geo.* 3. 526

11. An attorney's clerk, though not clerk to the Defendant's attorney, cannot become bail above. *Redit* v. *Broomhead*, *M.* 42 *Geo.* 3. 564

BAIL BOND,

See AMENDMENT, 1.
ESCAPE, 1, 2.
LUNATIC, 1.
PRACTICE, 5. 23.
STAYING AND SETTING ASIDE PROCEEDINGS, 3.

Final judgment may be entered on a bail bond, without executing a writ of inquiry. *Moody* v. *Pheaſant*, *E.* 41 *Geo.* 3. 446

BAILMENT,
See CARRIER, 1.

BANK ACT,
See AFFIDAVIT TO HOLD TO BAIL, 2. 4. 7, 8, 9. 12.

BANK NOTES,
See TENDER.

BANKRUPT,
See PLEADING, 1.

1. A debt accrued ſubſequent to an act of bankruptcy, but previous to the iſſuing of the commiſſion, is not barred by the certificate. *Bamford* v. *Burrell*. *M.* 40 *Geo.* 3. *Page* 1

2. *A.* being arreſted, *B.* became bail for him to the ſheriff, and judgment was obtained againſt *B.* upon the bail bond; *A.* then became bankrupt, a writ of error at that time depending on the bail-bond, which was afterwards non-proſſed; upon this the debt and coſts were levied on *B.* by *fi. fa.*, after which *A.* obtained his certificate: Held that *B.* was not barred by the certificate from recovering from *A.* the amount of the debt and coſts levied by the *fi. fa*: *Goddard* v. *Vanderheyden*, *M.* 12 *Geo.* 3. *in notis.* 8

3. The acceptor of a bill of exchange, two days before the expiration of the time for which the bill was originally drawn, called upon the indorſer, and informed him privately that he was inſolvent; the indorſer inſiſted on being paid the amount of the bill, offering at the ſame time to become ſecurity to the creditors for ſo much as the eſtate ſhould produce; whereupon the acceptor paid it, and four days after became bankrupt: it alſo appeared that the bill had been altered ſo as to make it fall due before this tranſaction, but without the Defendant's knowledge: Held that this was ſufficient proof of fraudulent preference to defeat the payment of the bill. *Singleton* v. *Butler*, *Mich.* 41 *Geo.* 3. 283

4. Payment to a creditor under an arreſt after a ſecret act of bankruptcy, is protected by 19 *Geo.* 3. *c.* 32 as a payment "in the uſual and ordinary courſe of trade and dealing." *Cox* v. *Morgan*, *E.* 41 *Geo.* 3. 398
S. P. Holmes v *Wennington*, *Scacc.* *T.* 30 *Geo.* 3. *in notis.* 399

5. If a debtor, at the inſtance of his creditor, give goods out of his ſhop in part payment of a bond not then due, and ſhortly afterwards become bankrupt, the mere circumſtance of the bond not being due will not alone vitiate the part payment on the ground of fraudulent preference. *Hartſhorn* v. *Slodden*, *M.* 42 *Geo.* 3. *Page* 582

BARON AND FEME,
See ARBITRATION, 4.

1. A feme covert ſole-trader in the city of London, is not liable to be ſued as ſuch in the courts at Weſtminſter. *Beard & Wiſe* v. *Webb. in Error.* *H.* 40 *Geo.* 3. 93

2. Though the cuſtom of the city of London be ſtated on the record. *id.* *ib.*

3. And even in the city courts the huſband ſhould be joined for conformity. *id.* *ib.*

4. An Engliſhman employed in the ſervice of the Britiſh government reſiding in a foreign country, and having lands there, upon the ceſſation of his employment in conſequence of war between the two countries, ſent his wife and family to this country, but continued to reſide abroad himſelf: Held that the wife, not having repreſented herſelf as a feme ſole, was not liable to be ſued as ſuch. *Marſh* v. *Hutchinſon*. *Trin.* 40 *Geo.* 3. 226

BENEFICE,
See PLEADING, 20.

BILL OF PARTICULARS,
See EVIDENCE, 6.
PAYMENT OF MONEY INTO COURT, 2.

An order for a bill of particulars does not ſuſpend the time for pleading, and therefore Plaintiff may ſign judgment immediately after delivering the particular, if the time for pleading be then out. *Hifferman* v. *Langelle*, *H.* 41 *Geo.* 3. 363

BILL OF SALE,
See FRAUDULENT CONVEYANCE, 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES,
See BAIL, 10.
BANKRUPT, 3.
MONEY HAD AND RECEIVED, 1.
PLEADING, 7.
PAYMENT, 1, 2.
PRACTICE, 8, 9.

1. If the indorſer of a bill, having ſued the acceptor to judgment, and taken out execution, receive of him a ſum of money in part payment, and take his ſecurity for the remainder, with the exception of a nominal ſum only, he is thereby precluded from afterwards ſuing the indorſer. *Engliſh* v. *Darley*, *H.* 40 *Geo* 3. *Page* 61

2. Debt lies by the payee againſt the maker of a promiſſory note expreſſed to be for value received. *Biſhop* v. *Young*, *H.* 40 *Geo.* 3. 78

3. An action will not lie on a promiſſory note given in payment of a wager on the amount of the hop duties. *Shirley* v. *Sankey*, *E.* 40 *Geo.* 3. 130

4. A warrant was directed to an officer of exciſe by the commiſſioners, commanding him to apprehend a perſon convicted in ſeveral penalties and take him to priſon, and keep him there until the amount of the penalties was paid; the officer having arreſted the party, diſcharged him on a promiſſory note for the amount of the penalties payable at a future day; and the commiſſioners afterwards approved of his conduct: Held that the diſcharge was a good conſideration for the note, and that an action might be maintained thereon. *Pilkington* v. *Green*, *E.* 40 *Geo.* 3. 151

5. *A.* with a view to accommodate *B.* lent him a bill, drawn by himſelf upon and accepted by *C.*, who had effects of *A.*'s in his hands; *B.* indorſed it to *D.* who indorſed it over; the day before the bill became due *B.* paid the amount to *A.*, who on hearing that *C.* had failed gave *B.* a check for the amount of the bill, and ſent him with it to *D.* to enable him to pay the bill when due; four days after that time *A.* learning that payment had not been demanded, deſired *D.* not to pay the bill, as no notice of non-payment had been given by the holder, and offered to indemnify him; notwithſtanding this *D.* afterwards paid the bill: Held that *D.* paid the bill in his own wrong. *Whitfield* v. *Savage*, *M.* 41 *Geo.* 3. 277

6. A note promiſing to pay "on the ſale, or produce immediately when ſold, of the White Hart Inn St. Alban's Herts, and the goods and value received" cannot be declared upon as a promiſſory note within the ſtatute, though it be averred that before the action commenced the White Hart Inn and the goods were ſold. *Hill* v. *Halford*, *Exchequer Chamber*, *E.* 41 *Geo.* 3. *Page* 413

BOND,

Contribution.
See Evidence, 3.
Penalty, 1.

1. A bond taken by commiſſioners appointed under an incloſure act, to indemnify themſelves againſt the expences of a ſuit brought to try the right to an allotment made by them, and in which they are, according to the directions of the act, made defendants, is not void. *Iles* v. *Boxall*, *H.* 40 *Geo.* 3. 89

2. Though there be a fund provided out of which ſuch expences may in ſome caſes be ſatisfied. *id.* *ib.*

3. At leaſt if the commiſſioners doubt whether the caſe in queſtion be one of thoſe caſes. *id.* *ib.*

4. *A.* executed a bond as the joint and ſeveral bond of himſelf and *B.*, and ſigned it "*A.* and *B.*," having no authority from *B.* ſo to do: Held that the bond was good, as the ſeveral bond of *A.* *Elliot* v. *Davis*, *M.* 41 *Geo.* 3. 338

BURGLARY,

See Larceny.

Indictment for a burglary, laid in the 1ſt. count to have been committed in the houſe of *M. R. B.*, in the 2d. of *I. B.*, and in the 3d. of *W. N.* It appeared that the place where the robbery was committed, was the centre of a building having two wings; that in the centre building the buſineſs of *M. R. B.*, *I. B.*, *W. N.*, and ſeveral other perſons was carried on; that in part of one of the wings was the dwelling of *M. R. B.*, and in the other part that of *I. B.*, neither having any internal communication with the centre, except by a window in the dwelling of *I. B.*, which looked into a paſſage that ran the whole length of the centre, and that the other wing was occupied by *W. N.*, from which there was no communication with the centre. *Semb.* That the robbery did not amount in law to a burglary. *The King* v. *John Egginton* & *others*, *T.* 41 *Geo.* 3. 508

C.

CARRIER.

If *A.* ſend goods by *B.*, who ſays "I will warrant they ſhall go ſafe," *B.* is liable for any damage ſuſtained by the goods, notwithſtanding *A.* ſend one of his own ſervants in *B.*'s cart to look after them. *Robinſon* v. *Dunmore*, *E.* 41 *Geo.* 3. *Page* 416

CERTIFICATE,

See BANKRUPT, 1, 2.

CHARTER,

See AUTHORITY, 2, 3.

COGNOVIT,

See STAMPS, 1, 2, 3.

COIN,

See PLEADING, 9.

COMMON,

See PLEADING, 12. 18. 29.

COMMON RECOVERY.

1. The court amended a recovery by inſerting a new pariſh in the writ of entry, upon an affidavit of the original intent of the parties to include all their property within the county, and of the aſſent of all perſons intereſted at the time of the amendment. *Wheeler* v. *Heſeltine*. *M.* 42 *Geo.* 3. 560

2. A writ and the ſubſequent proceedings in a recovery, were amended by inſerting the words, "all and all manner of tithes whatſoever yearly ariſing &c. from and out of the ſaid premiſes," on an affidavit, ſetting out the vouchee's title to the tithes, and ſtating his intention to have paſſed all his intereſt in the premiſes, the word "hereditaments" being contained in the deed to lead the uſes, and the recovery being of Michaelmas term, 39 *Geo.* 3. *Dowſe* v. *Reeve*, *M.* 42 *Geo.* 3. 578

3. On the 23d June 12 *Geo.* 3. a recovery ſuffered in the 2d Oct. 11 *Geo.* 1. of the manor or deanery of Cheſter le Street, with its members and appurtenances, 30 meſſuages, &c. and 400 acres of moor, was amended by inſerting, in the writ of entry and ſubſequent proceedings, after the words "quadraginta acras moræ," the words "ac etiam advocationem, preſentationem, donationem, nominationem, liberam diſpoſitionem, et jus patronatus eccleſiæ de Cheſter le Street, ac etiam advocationem, &c. de curatione de Cheſter le Street," the word "hereditaments" being contained in the deed to lead the uſes, and the intention to paſs the advowſon with the reſt of the premiſes appearing, although the amendment was conteſted. *Milbank* v. *Joliffe*, *Court of Pleas at Durham*, 23d *June*, 12 *Geo.* 3. *in notis.* *Page* 580

COMPOSITION REAL,

See TITHES, 4.

CONSIDERATION,

See ASSUMPSIT, 1.
BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.

CONSIGNOR AND CONSIGNEE,

See STOPPAGE IN TRANSITU.

CONTRACT,

See FRAUDS, STATUTE OF.
PLEADING, 13, 14, 15.

CONTRIBUTION.

1. It ſeems that one of ſeveral co-ſureties in a bond may recover againſt any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of ſureties. *Cowell* v. *Edwards*, *Trin.* 40 *Geo.* 3. 268

2. Even though the inſolvency of the principal and of the other ſureties be not proved. *ib.*

3. If *A.*, *B.*, and *C.* become bound as ſureties for *D.* in three ſeparate bonds, and any one of them be compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their reſpective bonds. *Sir E. Deering* v. *The Earl of Winchelſea*, *Feb.* 8. 1787. *in notis.* 270

CONVICTION,

See HABEAS CORPUS, 2.

CONVOY,

See SHIP, 2.

COSTS,

See Courts, 1. 3.
Lunatic, 2.

1. The coſts of two actions between the ſame parties though in two different courts may be ſet off againſt each other. *Hall* v. *Ody. M.* 40 *Geo.* 3. *Page* 28

2. And in *C. B.* this may be done notwithſtanding the lien of the attorney for his coſts. *id.* *ib.*

3. In *C. B.* if a Plaintiff obtain judgment upon one of ſeveral counts in a declaration, he is entitled to the coſts of the whole. *Spicer* v. *Teaſdale, M.* 40. *Geo.* 3. 49

4. In *C. B.* if the Plaintiff proceed to trial after money paid into court, and the verdict be againſt him, he is notwithſtanding entitled to coſts up to the time of the money paid in. *Wilton* v. *Place, M.* 40 *Geo.* 3. 56

5. The court will not compel a priſoner of war who ſues for wages earned on board an Engliſh ſhip to give ſecurity for coſts. *Maria* v. *Hall, Trin.* 40 *Geo.* 3. 236

6. Covenant by the Plaintiff as adminiſtratrix on a breach ſubſequent to the death of her inteſtate, and judgment againſt her on demurrer: Held that ſhe was not liable to coſts. *Tatterſall* v. *Groote, Trin.* 40 *Geo.* 3. 253

7. In an action on a policy of inſurance with a count for money had and received, if the Defendant pay no money into court, but eſtabliſh as a defence that the riſk never commenced, if the Plaintiff obtain a verdict for the premium only, neither party is entitled to the coſts of the ſpecial count, but the Plaintiff is entitled to the coſts of the count on which he ſucceeds, and ſo much of the expences of the trial as were neceſſarily incurred by him in ſupport of that count. *Perſon* v. *Lee, M.* 41 *Geo.* 3. 330

8. [The court of *C. B.* in the above caſe declared that they had, ſince the caſe of *Spicer* v. *Teaſdale*, determined to adopt the practice of *K. B.* reſpecting coſts in caſes of this nature.]

9. If a Plaintiff in replevin plead ſeveral pleas in bar, upon which iſſues are joined and ſome iſſues are found for the Plaintiff and ſome for the Defendant, the latter is entitled to ſuch coſts of the trial as relate to the iſſues on which he has ſucceeded, as well as to the coſts of the pleadings. *Vollum* v. *Simpſon, H.* 41 *Geo.* 3. *Page* 368

10. If an avowant in replevin after trial and verdict for the Plaintiff obtain judgment *non obſtante veredicto*, in conſequence of the Plaintiff's pleas in bar being bad, he is not entitled to any coſts on the pleadings ſubſequent to the pleas in bar, becauſe he ſhould have demurred to them. *Da Coſta* v. *Clarke, H.* 41 *Geo.* 3. 376

11. Defendant having been arreſted on a *capias*, returnable on the firſt return of the term, on the day before the eſſoin day took out a ſummons to ſtay proceedings upon payment of the debt and coſts; on the eſſoin day Plaintiff filed a declaration *de bene eſſe*, and on the day after the eſſoin day Defendant obtained an order to ſtay proceedings: Held that the Plaintiff was entitled to the coſts of the declaration. *Fawcett* v. *Chriſtie, M.* 42 *Geo.* 3. 515

COVENANT,

See Agreement, 1.
Arbitration, 1, 2.
Costs, 6.
Deed, 1.

1. *A.* after granting certain premiſes in fee to *B.* and after warranting the ſame againſt himſelf and his heirs, covenanted that notwithſtanding any act by him done to the contrary, he was ſeized of the premiſes in fee, *and that he had full power, &c. to convey the ſame;* he then covenanted for himſelf, his heirs, executors, and adminiſtrators to make a cart-way, and that *B.* ſhould quietly enjoy without interruption from himſelf or any perſon claiming under him; and laſtly, that he, his heirs and aſſigns, and all perſons claiming under him ſhould make further aſſurance: Held that the intervening general words "full power, &c. to convey," were either part of the preceding ſpecial covenant, or if not, that they were qualified by all the other ſpecial covenants againſt the acts of himſelf and his heirs. *Browning* v. *Wright, M.* 40 *Geo.* 3. 13

2. *A.* being poſſeſſed of a leaſe for years, covenanted in an indenture for making a family proviſion that if he ſhould die during the continuance of the term of the leaſe, his executors or adminiſtrators *ſhould aſſign the*

reſidue to B.; *A.* afterwards purchaſed the reverſion in fee, and died: Held that *A.* did not, by the terms of the covenant, intend to preclude himſelf from purchaſing the fee, and therefore his executors were not liable upon that covenant. *Williamſon* v. *Butterfield*. *Hil.* 40 *Geo.* 3. *Page* 63

COURTS,

See BARON AND FEME, 1, 2, 3.
EXTORTION, 1.

1. If an attorney of *C. B.* bring an action by original in that court againſt a Defendant reſident in *Middleſex*, and recover under 40*s.*, the Court will allow a ſuggeſtion to be entered under 23 *Geo.* 2. *c.* 33. *ſ.* 19, to entitle the Defendant to double coſts. *Parker* v. *Vaughan*, *M.* 40 *Geo.* 3. 29
2. An action for uſe and occupation, may be brought in the county court of *Middleſex*. *ib.* *id.*
3. If the Plaintiff in an action of aſſault having recovered only 20*s.* damages whereby he is entitled to no more than 20*s.* coſts bring an action on the judgment, and obtaining judgment by default in that action, enter it up for debt and coſts, the Court on affidavit of the Defendant being reſident in the city of *London*, and liable to be ſummoned to the Court of Requeſts will, under the 39 & 40 *Geo.* 3. *c.* 104, ſet aſide the judgment as to the coſts. *Foot* v. *Coare*, *M.* 42 *Geo.* 3. 588

CUSTOM,

See BARON AND FEME, 1, 2, 3.
PLEADING, 12.

D.

DAMAGES,

See PENALTY, 1.
WASTE, 1, 2.

In treſpaſs for aſſault and battery, and not guilty pleaded, the jury are not at liberty to take into conſideration the circumſtances of the aſſault and battery with a view to reduce the verdict below the amount of the damage actually ſuſtained, if thoſe circumſtances could have been pleaded. *Watſon* v. *Chriſtie*, *T.* 40 *Geo.* 3. 224

DEBT,

See ABATEMENT, 1, 2.
BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

DEED.

A. by indenture (reciting that a ſuit was depending between him and *B.* reſpecting certain patents, and that the ſame could not be aſſigned without hazard of defeating the ſuit) granted abſolutely the ſaid patents, together with ſome others, to *C.*, excepting, however, until the determination of the above-mentioned ſuit, ſuch patents as ſhould be neceſſary to ſupport *A's* legal title; then followed a covenant, that *A.* upon the determination of the ſuit ſhould aſſign the excepted patent to *C.*, and that until ſuch aſſignment *A.* ſhould ſtand legally poſſeſſed of the ſame: Held that the legal intereſt in the excepted patents veſted in *C.* upon the determination of the ſuit without aſſignment. *Cartwright* v. *Amatt*, *M.* 40 *Geo.* 3. *Page* 43

DETAINER,

See PRACTICE, 18, 19.
PRISONER, 1.

DEVISE,

See EVIDENCE, 11.

1. *A.* after giving a life eſtate in certain copyholds to *B.* deviſed as follows: "All the reſt of my lands, tenements, and hereditaments, either freehold or copyhold, whatſoever and whereſoever, and alſo all my goods, &c. after payment of my juſt debts and funeral expences, I give, deviſe, and bequeath the ſame unto my wife *S. C.*:" Held that under this deviſe *S. C.* took only an eſtate for life. *Moor* v. *Denn d. Mellor in error*, *T.* 40 *Geo.* 3. 247
2. Deviſe to *G. L.* the teſtator's heir at law for life, and from and after his death to *C. B.* her heirs and aſſigns, in caſe ſhe ſhall ſurvive and outlive the ſaid *G. L.* but not otherwiſe, and in caſe ſhe ſhall die in the lifetime of the ſaid *G. L.* then to *G. L.* his heirs and aſſigns for ever: Held that the deviſe to *C. B.* was a contingent remainder, and barred by a recovery ſuffered by *G. L.* *Doe d. Planner* v. *Scudamore*, *M.* 41 *Geo.* 3. 289
3. Under a general deviſe of all manors, meſſuages, lands, tenements, and hereditaments, leaſehold meſſuages will not paſs unleſs it appear to have been the evident intent of the deviſor that they ſhould paſs.

Thomſon v. *Lawley*, *M.* 41 *Geo.* 3. *Page* 303

4. Deviſe "to *S. S.* her heirs and aſſigns for ever, but if ſhe ſhall happen to die leaving no child or children lawful iſſue of her body living at the time of her death, then to *F. B.* and his heirs:" Held the deviſe in fee to *S. S.* was not reſtrained by the ſubſequent words to an eſtate tail, and that the deviſe over to *F. B.* was a good executory deviſe. *Doe d. Barnfield* v. *Wetton*, *M.* 41 *Geo.* 3. 324

5. *A.* deviſed all his eſtates in the county of *D.* to a truſtee for 200 years, to the uſe of the truſtee during the life of his ſon *J. S.* to preſerve contingent remainders, nevertheleſs to permit *J. S.* to receive the rents and profits; and after his deceaſe to the uſe of the firſt ſon of the ſaid *J. S.* to be begotten on the body of the woman he ſhould happen to marry, and the heirs male of ſuch firſt ſon, and for want of ſuch iſſue to the uſe of the ſecond, third, fourth, and every other ſon of *J. S.* and the heirs male of their bodies in ſucceſſion, and for want of ſuch iſſue male, then to the uſe of his daughter *E. S.* her heirs and aſſigns for ever; the teſtator afterwards made a codicil whereby he deviſed all his eſtate to his ſon *J. S.* and his children lawfully to be begotten, with power for him to ſettle the ſame by will or otherwiſe on ſuch of them as he ſhould think proper, and for default of ſuch iſſue, then to his daughter *E. S.* and her children lawfully to be begotten with a ſimilar power, and in default of ſuch iſſue to *J. S.* and *E. S.* equally between them: and he further provided that a ſettlement of 200*l.* *per annum* ſhould be made on any woman whom his ſon ſhould happen to marry, and that his eſtates ſhould be chargeable therewith. At the time of making the codicil *J. S.* was married but had no child: Held that the codicil was to be conſtrued independent of the will; and that under the codicil *J. S.* took an eſtate tail, with a power to ſettle the eſtates on all or any of his iſſue in ſuch way as he ſhould appoint, and thereby determine the eſtate tail ſo far as it ſhould be inconſiſtent with ſuch ſettlement. *Seale* v. *Barter*, *T.* 41 *Geo.* 3. 485

6. *A.* by will deviſed "all his freehold and copyhold lands, tenements, and hereditaments" in truſt for certain purpoſes, and afterwards purchaſed new lands; he then made a codicil whereby, after reciting that he had deviſed "all his freehold and copyhold lands, tenements, and hereditaments" to the truſtees named in the will, he revoked the deviſe ſo far as it related to two of the truſtees, and deviſed "his ſaid lands, tenements, and hereditaments" to the other truſtees upon the ſame truſts, and concluded with declaring the codicil to be part of his will: Held that the after-purchaſed lands did not paſs. *Bowes* v. *Bowes*, *Dom Proc.* *T.* 41 *Geo.* 3. *Page* 500

7. *A.* deviſed certain eſtates to *B.* for life, remainder to his ſons and daughters in ſtrict ſettlement, remainder to *C.* for life, remainder to his ſons and daughters in like manner, remainder to his own right heirs, and died; *B.* being ſeized of the above eſtates as tenant for life, and alſo entitled to one ſixth of the reverſion as one of the right heirs of *A.* made his will, whereby he gave to his wife for life all ſuch freehold and copyhold lands as he had purchaſed, or was ſeized of in fee ſimple or in exchange for other lands in *Kent*; and then after reciting that he had granted a leaſe for years to *D.* of the lands whereof he was tenant for life under *A.*'s will, declared that in caſe ſuch perſons as ſhould be tenants for life or otherwiſe of that eſtate, by virtue of *A.*'s will ſhould not moleſt *D.* in the poſſeſſion of the ſaid lands as leaſed, and at the expiration of the leaſe ſhould grant a new leaſe to his (*B.*'s wife) for life, then he deviſed his lands purchaſed of *E.* and *F.*, and all lands that he then had or might have a right to, both freehold and copyhold, ariſing from exchange of land, act of parliament or otherwiſe in *Kent*, deviſed to his wife for her life, to go with and be ſubject to the ſame entail as the eſtates left by *A.* were or might be ſubject to by virtue of *A.*'s will, to take effect immediately after the deceaſe of his wife, and in ſuch caſe recommending his wife to give the furniture which belonged to the houſe on the eſtates left by *A.* to whomſoever might be living to enjoy it, but in caſe ſuch perſons as ſhould be tenants for life or otherwiſe by virtue of *A.*'s will ſhould refuſe to grant ſuch leaſe or ſhould diſturb *D.*, then he

gave to his ſaid wife and her heirs all his freehold and copyhold lands and houſes which he had before deviſed to her for life only, and all the reſt and reſidue of his real eſtate whatſoever, and all the reſt and reſidue of his perſonal eſtate of what nature or kind ſoever or whereſoever he gave to his ſaid wife and her heirs, executors, administrators, and aſſigns for ever; *D.* was not moleſted and a new leaſe was granted to the wife of *B.* for her life: Held that the wife of *B.* was entitled to the one ſixth of the reverſion under the reſiduary clauſe in *B.*'s will. *Goodright, d. Earl of Buckinghamſhire and others* v. *Marquis of Downſhire and Wiſe, M.* 42 *Geo.* 3. *Page* 600

DOMICILE.

1. Perſonal property follows the perſon of the owner, and in caſe of his deceaſe muſt be diſtributed according to the law of the country in which he was domiciled at the time of his death, without regard to the actual *ſitus* of the property. *Bruce* v. *Bruce, Dom. Proc. April* 1790. 229 *n.*
2. A perſon born in *Scotland* having gone out to *India* in the ſervice of the *Eaſt India* Company, and having died there, it was held that *India* was the place of his domicile. *id.* *ib.*
3. For the place where a man is, ſhall *primâ facie* be taken to be the place of his domicile, *id.* *ib.*
4. But if ſuch perſon had gone to *India* in the King's ſervice, or for any temporary purpoſe, it ſeems that the domicile of his birth would not have been altered, *id.* *ib.*
5. Mere intention to return to his native country at ſome future period, is not ſufficient to prevent the change of domicile if the perſon die before ſuch intention be put in execution, *id.* *ib.*

E.

EJECTMENT,

See LIMITATIONS, STATUTES OF.
MORTGAGE, 1.
PRACTICE, 7. 11.

ERROR, WRIT OF,

See BAIL, 5, 6, 7.
PRACTICE, 13. 21. 25.

ESCAPE,

See PLEADING, 26, 27.

1. The ſheriff having arreſted a party, permitted him to go at large without taking a bail bond, returned *cepi corpus*, and before the expiration of the rule to bring in the body put in bail: Held that he was not liable either to an action of eſcape, or falſe return. *Pariente* v. *Plumbtree, M.* 40 *Geo.* 3. *Page* 35
2. If after the commencement of an action of eſcape againſt the ſheriff for not taking a bail bond good bail be put in and juſtified in the room of bail before put in, who by the practice of the court were a mere nullity, the Plaintiff cannot recover. *Allingham* v. *Flower, T.* 40 *Geo.* 3. 246

ESTOPPEL.

Debt on bond conditioned for the performance by *R. G.* of all the covenants on his part mentioned in a certain indenture bearing even date with the bond, made or expreſſed to be made between the Plaintiff and the ſaid *R. G.* Plea, that before the execution of the bond it was agreed that the Plaintiff ſhould grant to *R. G.* a leaſe under certain covenants, and that the Defendant ſhould enter into a bond as ſurety for the performance of theſe covenants; that the Defendant did accordingly enter into the bond on which the action was brought, but that the indenture mentioned in the condition thereof is the leaſe ſo agreed upon and no other, but that the ſaid leaſe never was executed: Held on demurrer, that the Defendant was eſtopped by the condition of the bond from pleading this matter. *Hoſier* v. *Searle, M.* 41 *Geo.* 3. 299

EVIDENCE,

See ACTION ON THE CASE, 1.
DAMAGES, 1.
INSURANCE, 6.
PAYMENT, 1, 2.
STAMPS, 1, 2, 3. 5.
TITHES, 3.
VARIANCE, 1, 2.

1. If a Plaintiff's attorney previous to bringing an action for a diſtreſs under the warrant of a magiſtrate make out two papers preciſely ſimilar, purporting to be demands of

of a copy of the warrant, purſuant to the 24 *Geo.* 3. *c.* 44. *ſ.* 6. and ſign both for his client, and then deliver one to the Defendant, the other will be ſufficient evidence at the trial. *Jory* v. *Orchard, M.* 40 *Geo.* 3. *Page* 39

2. If *A.* agree to acknowledge an old warrant of attorney given by him, "ſo as to enable [redacted]. to enter up judgment thereon," judg- ent may be entered up under a judge's der without an affidavit of the ſubſcribing tneſs. *Laing* v. *Raine, H.* 40 *Geo.* 3. 85
3. bond having been executed by *A.* and ſted by one witneſs, was carried into an joining room and ſhewn to *B.*, who was red to atteſt it alſo, which he accordingly did in the preſence of *A.*: Held that *B.* was a good witneſs to prove the execution. *Parke* v. *Mears, Trin.* 40 *Geo.* 3. 217
4. A copy of an attorney's bill, the original of which has been delivered to the Defendant, may be admitted in evidence without proof of notice to produce the original. *Anderſon* v. *May, T.* 40 *Geo.* 3. 237
5. And is concluſive as to the reaſonableneſs of the *items, id.* *ib.*
6. If a bill of particulars ſtate the Plaintiff's demand to be for goods ſold and delivered to the Defendant, no evidence can be received of goods ſold by the Defendant as agent for the Plaintiff. *Holland* v. *Hopkins, T.* 40 *Geo.* 3. 243
7. If at the bottom of an unſtamped draft (not within the exception of the 23 *Geo.* 3. *c.* 49. *ſ.* 4.) there be an acknowledgment of the drawee, that a third perſon paid it for him, that acknowledgment cannot be received in evidence; becauſe, if received, it would give effect to the draft. *Caſtleman* v. *Ray, E.* 41 *Geo.* 3. 383
8. Evidence to the character of a Defendant is not admiſſible upon the trial of an information in the Exchequer. *The Attorney General* v. *John Bowman. Sittings at Weſtminſter, coram Eyre, Ch. B.* 16 *June* 1791. 532 *in notis.*
9. If a Defendant give in evidence an anſwer in Chancery of the Plaintiff, it will not entitle the Plaintiff to avail himſelf of any matters contained in ſuch anſwer which are only ſtated as hearſay. *Semb. Roe d. Pellatt* v. *Ferrars, M.* 42 *Geo.* 3. 548
10. No parol evidence can be received to explain an agreement in which there is no latent ambiguity. (See *Agreement*, 1, 2.) *Coker* v. *Guy, M.* 42 *Geo.* 3. *Page* 565
11. *A.* deviſed his eſtate at *Luſhill* in the county of *Wilts*, and *Hearne* and *Buckland* in the county of *Kent*, "to his ſon in fee;" at the time of the deviſe *A.* had lands in the pariſh of *Hearne*, and alſo in the ſeveral pariſhes of *C. W. S. R.* and *S.*, all which he purchaſed by one contract of one perſon, and uſed to call his "*Hearne* eſtate," or "*Hearne-Bay* eſtate;" the eſtate at *Luſhill* in *Wilts*, and alſo a farm called *Buckland* Farm in *Kent*, were ſold before the teſtator's death, and at the time of his death he had no eſtate in *Kent*, except that which lay in the pariſhes of *Hearne*, *C. W. S. R.* and *S.*: *Qu.* Whether the above facts were admiſſible in evidence to ſhew that the teſtator intended to paſs the land in the ſeveral pariſhes of *C. W. S. R.* and *S.* as well as that in the pariſh of *Hearne*? *Whitbread* v. *May, M.* 42 *Geo.* 3. 593

EXCHEQUER CHAMBER, Court of,

See Interest of Money, 1.

EXCISE,

See Habeas Corpus, 1, 2.

EXECUTION,

See Attorney, 1.

The Court will not diſcharge a priſoner out of execution, becauſe the judgment againſt him is not docketted and entered upon the rolls of the Court. *Pariente* v. *Caſtle, E.* 40 *Geo.* 3. 163

EXECUTOR and ADMINISTRATOR,

See Costs, 6.

Pleading, 2, 3. 21.

EXTORTION,

See Bond, 1, 2, 3.

If by abuſe of the proceſs of one of the Courts at *Weſtminſter*, a ſheriff's officer extort a promiſſory note from a ſuitor, and then declare upon that note in another of the Courts at *Weſtminſter*, the latter Court cannot interfere ſummarily to puniſh the officer under the 32 *Geo.* 2. *c.* 28. *ſ.* 11. *Ex parte Evan Evans, H.* 40 *Geo.* 3. *Page* 88

F.

FALSE JUDGMENT,

See Pleading, 28, 29.

FALSE RETURN,

See Escape, 1.

FILAZER,

See Bail, 8, 9.

FINE.

The Court refuſed to amend a fine paſſed two years back, by altering the ſurnames of the Deforciants, though it was ſworn that a wrong name had been inſerted by miſtake. *Ex parte Motley et Ux. T.* 41 *Geo.* 3. 455

FISHERY,

See Sea-Shore, 1, 2, 3.

FRANKING.

A *Roman* Catholic Peer is not entitled to frank. *Lord Petre* v. *Lord Auckland, E.* 40 *Geo.* 3. 139

FRAUD,

See Bankrupt, 3.
Payment of Money into Court, 4.

FRAUDS, STATUTE of,

1. A bill of parcels in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, ſeems to be a ſufficient memorandum of a contract within the Statute of Frauds. *Saunderſon* v. *Jackſon, T.* 40 *Geo.* 3. 238
2. At all events a ſubſequent letter, written and ſigned by the vendor, referring to the order, may be connected with the bill of parcels ſo as to take the caſe out of the Statute, *id.* *ib.*

FRAUDULENT CONVEYANCE.

The goods of *A.* being taken in execution and put up to ſale, *B.* became the purchaſer, and took a bill of ſale of the ſheriff, but permitted *A.* to continue in poſſeſſion; *A.* then executed another bill of ſale of the ſame goods to *C.* a creditor, under which the latter took poſſeſſion; whereupon *A.* brought an action againſt *C.* for the goods: Held that the firſt bill of ſale was valid, and that *A.* was therefore entitled to recover. *Kidd* v. *Rawlinſon, H.* 40 *Geo.* 3. *Page* 59

FREIGHT,

See Pleading, 16, 17.

G.

GAOLER,

See Habeas Corpus, 1, 2.

H.

HABEAS CORPUS.

1. Service of a demand of a copy of the commitment on the turnkey of a priſon, is not ſufficient to ſupport an action againſt the gaoler for the penalty incurred by him under the habeas corpus act for not delivering the copy to the priſoner within due time after demand made, if the gaoler himſelf were in the priſon. *Huntley* v. *Luſcombe, M.* 42 *Geo.* 3. 530
2. *Qu.* Whether a commitment in execution for a penalty on conviction before a magiſtrate for an offence againſt the exciſe laws be a commitment for "a criminal matter," within the proviſions of the habeas corpus act, ſo as to entitle a priſoner to an action againſt the gaoler for not delivering a copy of the commitment within a certain time after demand made? *id.* *ib.*

HOPS,

See Bills of Exchange and Promissory Notes, 3.
Tithes, 1, 2, 3.

HORSE-RACE,

See Wager, 1.

I.

ILLEGAL CONTRACT,
See ARBITRATION, 3.
BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.
MONEY HAD AND RECEIVED, 2.
PARTNERS, 1, 2.

IMPARLANCE,
See PRACTICE, 12. 14.

INCLOSURE ACT.
If an act of parliament for incloſing and allotting the common and waſte lands of a pariſh through which a navigable river flows, empower Commiſſioners to ſet out ſuch public and private roads and ways as they ſhall think neceſſary, and direct that all roads and ways not ſo ſet out ſhall be deemed part of the lands to be allotted, an ancient towing path on the bank of the river, though not ſet out by the Commiſſioners, ſtill ſubſiſts, for it is not within their juriſdiction. *Simpſon* v. *Scales*, *T.* 41 *Geo.* 3. *Page* 496

INDEMNITY,
See BOND, 1.

INDICTMENT,
See PLEADING, 9.

INFORMATION,
See EVIDENCE, 8.

INQUIRY, WRIT OF,
See BAIL-BOND, 1.
PRACTICE, 15.

INSURANCE,
See PARTNERS, 1, 2.
PLEADING, 10.

1. Policy on the *Ceres* "at and from *Oporto* to *Lynn*, with liberty to touch at any ports on the coaſt of *Portugal* to join convoy, particularly at *Liſbon*, at 12 guineas *per cent.* to return ſix pounds *if ſhe ſail with convoy from the coaſt of Portugal* and arrive;" the *Ceres* ſailed from *Oporto* with a ſloop and cutter appointed to protect the trade of that place to *Liſbon*, from whence it was to proceed with the *Liſbon* trade under a larger convoy for *England*; in the way from *Oporto* to *Liſbon* the fleet was diſperſed by a ſtorm, and the *Ceres*, judging for the beſt, run for *England*, and arrived: Held that the aſſured was entitled to a return of premium. *Audley* v. *Duff*, *H.* 40 *Geo.* 3. *Page* 111
2. So where the words were "if ſhe depart with convoy from *Portugal* and arrive." *Everard* v. *Hollingworth*, *H.* 40 *Geo.* 3. *ib. in notis.*
3. If *A.* and *B.* declare upon a policy of inſurance, and aver that they were intereſted until and at the time of the loſs, and it be proved that *C.*, after the policy effected, but before the loſs, became a partner with *A.* and *B.* in the goods inſured; it ſeems that the variance is not fatal, for the averment of intereſt relates to the time of making the policy. *Perchard* v. *Whitmore. Guildhall Sitting after Mich.* 1786, *coram Buller J.* 155 *n.*
4. A warranty to depart with convoy is not complied with, unleſs ſailing inſtructions be obtained before the ſhip leaves the place of rendezvous, if by due diligence of the maſter they can be obtained. *Anderſon* v. *Pitcher*, *E.* 40 *Geo.* 3. 164
5. If a policy be effected on a foreign built ſhip *Britiſh* owned (which not being required to be regiſtered may ſail without convoy), it is not incumbent on the aſſured to communicate to the underwriter, at the time of making the policy, the circumſtance of her being foreign built. *Long* v. *Duff*, *T.* 40 *Geo.* 3. 209
6. In a declaration on a policy of inſurance, the Plaintiff averred that Meſſrs. *H.*, at the time of effecting the policy and at the time of the loſs, were intereſted in the cargo which was the ſubject of the inſurance "to a large amount, to wit, to the amount of all the money ever inſured thereon;" at the trial it appeared, that previous to effecting the policy Meſſrs. *H.* had admitted another mercantile houſe to a joint concern in the cargo inſured: Held that the averment was ſupported by the evidence. *Page* v. *Fry*, *T.* 40 *Geo.* 3. 240
7. In an action on a policy of inſurance, with a count for money had and received, if the Defendant pay no money into Court, but

eſtabliſh as a defence that the riſk never commenced, the Plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counſel in opening the caſe. *Penſon* v. *Lee*, *M.* 41 *Geo.* 3. *Page* 330

8. Inſurance on goods from *A.* to *B.* "until they ſhould be there diſcharged and ſafely landed;" on their arrival at *B.* the merchant to whom the goods belonged employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loſs. *Hurry* v. *The Royal Exchange Aſſurance Company*, *E* 41 *Geo.* 3. 430

8. *P. Rucker* v. *London Aſſurance Company*, *Guildhall*, 8 *June* 1784, *coram Buller J.* 432. *n.*

INTEREST OF MONEY,

See MONEY HAD AND RECEIVED, 3.

1. If judgment for the Plaintiff on an attorney's bill be affirmed in the Exchequer Chamber, that Court will not allow intereſt. *Walker* v. *Bayley in Error*, *T.* 40 *Geo.* 3. 219

2. In a contract for the ſale of goods if any particular time be limited for payment of the price, the vendor is entitled to intereſt on the price from that time. *Mountford* v. *Willes*, *M.* 41 *Geo.* 3. 337

INTEREST INSURABLE,

See PLEADING, 10, 11.

ISSUABLE PLEA,

See PRACTICE, 28.

J.

JUDGMENT,

See BAIL-BOND, 1.
EXECUTION, 1.
PRACTICE, 6. 26.
PRISONER, 2.
WASTE, 1, 2.

1. If the judgment of Commiſſioners of Appeal in certain caſes be declared final by ſtatute, their judgment cannot be queſtioned in an action of treſpaſs. *The Earl of Radnor* v. *Reeve*, *E.* 41 *Geo.* 3. 391

L.

LARCENY.

If a ſervant being ſolicited to become an accomplice in robbing his maſter's houſe, inform his maſter thereof, who thereupon tells him to carry on the buſineſs, and conſents to his opening a door leading to the premiſes, and being with the robbers during the robbery, and alſo marks his property and lays it in a place where the robbers are expected to come, this conduct of the maſter will not amount to a defence in an indictment againſt the robbers. *The King* v. *John Eggington and others*, *Trin.* 41 *Geo.* 3. *Page* 508

LETTERS,

See FRANKING.

LIBEL,

See STAYING AND SETTING ASIDE PROCEEDINGS, 1.

LICENCE,

See WAGES, 1.

LIEN,

See COSTS, 2.

LIMITATIONS, STATUTES OF,

See TIME, 1.
USURY, 1.

I. S demiſed lands to the rector of *D.* for 40 years at a certain rent in the leaſe, the rector, after covenanting for payment of the rent, further granted to *I. S.* the tithe of oats for the pariſh of *D.*; the leaſe alſo contained a proviſo for re-entry, in caſe the rent ſhould be in arrear, or *I. S.* his heirs, &c. ſhould be diſturbed by the rector or his aſſigns in the receipt of the tithe, and concluded with a covenant on the part of *I S.*, that the rector ſhould quietly enjoy the lands under the covenants, grants, and agreements contained in the leaſe. After the expiration of the leaſe, the rector continued to hold the land, but witheld the rent for more than 20 years; the heirs of *I. S.* at the ſame time continuing to take the tithe of oats, and ſome confuſion exiſting as to the reſpective rights of the rector and the heirs of *I. S.*, the latter being portioniſts of the tithes of the pariſh: Held in ejectment by the repreſentatives of *I. S.* againſt the

the rector that the poſſeſſion of the land by the latter were not adverſe ſo as to let in the operation of the ſtatute of limitations. *Roe ex Dim. Pellatt* v. *Ferrars*, *M.* 42 *Geo.* 3. *Page* 542

LONDON,

See Baron and Feme, 1, 2, 3.

LUNATIC,

1. If a perſon againſt whom a commiſſion of lunacy has iſſued be arreſted, the Court of Common Pleas has no power to diſcharge him on the ground of his lunacy. *Steel* v. *Allan*, *H.* 41 *Geo.* 3. 362
2. Nor will the Court compel ſecurity for coſts in error on the ground of the Plaintiff in error being a lunatic. *Steel* v. *Allan*, *E.* 41 *Geo.* 3. 437

M.

MALICIOUS PROSECUTION,

See Action on the case, 1.

MISJOINDER,

See Pleading, 21.

MONEY,

See Pleading, 9.

MONEY had and RECEIVED,

See Bills of exchange and promissory notes, 5.

1. *A.* with a view to accommodate *B.* lent him a bill drawn by himſelf upon and accepted by *C.* who had effects of his in his hands; *B.* indorſed it to *D.*, who indorſed it over; the day before the bill became due, *B.* paid the amount to *A.*, who on hearing that *C.* had failed gave *B.* a check for the amount of the bill, and ſent him with it to *D.* to enable him to pay the bill when due; four days after that time, *A.* learning that payment had not been demanded deſired *D.* to pay the bill, as no notice of nonpayment had been given by the holder, and offered to indemnify him; notwithſtanding this *D.* afterwards paid the bill: Held that *D.* paid the money in his own wrong; and that *A.* was entitled to recover back the money paid into the hands of *D.* by *B.* in an action for money had and received. *Whitfield* v. *Savage*, *M.* 41 *Geo.* 3. *Page* 277
2. *A.* in conſideration of 200 guineas paid by *B.* gave a bond for the payment of an annuity to the latter of 100 guineas, until the hop duty ſhould amount to a certain ſum; before this event had taken place *A.* brought an action to recover back the 200*l.* of *B.*: Held that the action was maintainable. *Tappenden* v. *Randall*, *T.* 41 *Geo.* 3. 467
3. In an action for money had and received nothing but the net ſum received without intereſt can be recovered, *id.* *ib.*
4. *A.* being indebted to *B.* in 700*l.* applied to *C.* to lend him that ſum, who agreed ſo to do, provided *A.* would allow him to deduct therefrom 80 *l.* due from *B.* to himſelf upon ſtock jobbing tranſactions; accordingly *C.* advanced 620 *l.* and *A.* gave him a promiſſory note for 700 *l.*; *A.* then paid over to *B.* the 620 *l.* who gave him a diſcharge for the whole 700*l.*; a promiſſory note for 700 *l.* given by *A.* being paid when when due, *B.* brought an action againſt *C.* to recover 80 *l.* as money had and received by *C.* to his uſe: Held that *B.* could not maintain the action, but that it muſt be brought by *A.* if by any one. *Scholey* v. *Daniel*, *M.* 42 *Geo.* 3. 540

MORTGAGE,

1. The truſtees under a turnpike-act having demiſed to one of ſeveral mortgagees, ſuch proportion of the tolls ariſing from the road and of the toll-houſes and toll-gates for collecting the ſame, as the ſum advanced by him bore to the whole ſum raiſed on the credit of the tolls, the mortgagee brought ejectment for the toll-houſes and toll-gates in order to repay himſelf the intereſt due: Held that he might well maintain his action, notwithſtanding a clauſe in the act that all the mortgagees ſhould be creditors upon the tolls in equal degree. *Doe*, *d.* *Banks* v. *Booth*, *T.* 40 *Geo.* 3. 219

N.

NAVIGABLE RIVERS,

See Inclosement.

NON-RESIDENCE,

See VARIANCE, 2.

NONSUIT,

JUDGMENT AS IN CASE OF.

NUL TIEL RECORD,

See PRACTICE, 20.

O.

OBLIGATION,

See BOND.

OFFICER,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.
EXTORTION, 1.

1. If an officer ſeize goods in obedience to the warrant of a magiſtrate, whether that warrant be legal or not, he cannot be ſued without a previous demand of a copy and peruſal of the warrant, according to the 24 *Geo.* 2. *c.* 44. *Price* v. *Meſſenger*, *E.* 40 *Geo.* 3. *Page* 158
2. If the warrant be to ſeize "ſtolen goods," and he ſeize goods which turn out not to have been ſtolen, he is ſtill within the protection of the 24 *Geo.* 2. *c.* 44. *id.* *ib.*

OYER,

Oyer may be prayed at any time before the expiration of 24 hours after demand of a plea, though the rule to plead be out. *Sparkes* v. *Simpſon*, *H.* 41 *Geo.* 3. 379

P.

PAPISTS,

See FRANKING, 1.

PARLIAMENT,

See FRANKING, 1.

PARTNERS,

See AFFIDAVIT TO HOLD TO BAIL, 8.
ARBITRATION, 1, 2.
PLEADING, 7.

1. Money paid by one of two partners for the other, on account of loſſes incurred by them on partnerſhip inſurances, cannot be recovered in an action brought by him againſt the other partner. *Aubert* v. *Maze*, *H.* 41 *Geo.* 3. *Page* 371
2. And if this with other cauſes of diſpute between the two be referred to an arbitrator who awards a ſum due from one to the other for money ſo paid, the Court will ſet aſide that part of the award, *id.* *ib.*

PAYMENT,

See BANKRUPT, 3, 4.
MONEY HAD AND RECEIVED, 1.

1. Aſſumpſit for goods ſold and delivered. Plaintiff proved that having ſold goods to the Defendant he received from him a check upon *J. S.* a banker, directing the latter, two months after date, to pay to the Plaintiff a bill at two months for the amount of the goods, which check was indorſed by the Plaintiff, and paid by him into the banking houſe of *J. S.*, who entered it ſhort in the Plaintiff's account; that the Plaintiff and Defendant both kept accounts with *J. S.*, and that the general courſe of buſineſs between *J. S.* and moſt of his cuſtomers was to ſettle accounts on certain quarterly days; when he advanced bills for his cuſtomers or received bills from them he entered the whole amount in his books as bills, but on the quarterly days he debited his cuſtomers with the whole amount of bills advanced to or for them, crediting them at the ſame time for intereſt from ſuch day to the day when the bills would become due; and credited his cuſtomers for the whole amount of bills paid in by them, debiting them for the intereſt in like manner; and when a check was paid in for a bill to be drawn at a future day, he calculated and allowed intereſt on the next quarterly day to the time when ſuch bill, if drawn, would become payable; that the account between the Plaintiff and *J. S.* had been ſettled only ſix times between *May* 1788 and *March* 1793, but that each of thoſe ſettlements took place on a quarterly day; that on the 18th of *March* 1793, *J. S.* became bankrupt, a quarterly day having intervened between the payment of the check into the houſe of *J. S.* and his bankruptcy, upon which laſt quarterly day no ſettlement of

accounts between the Plaintiff and *J. S.* took place, nor was the amount of the check ever carried out as caſh, in any calculation of intereſt made thereon, till after the bankruptcy; that when the check was paid into the banking-houſe of *J. S.* there was a balance of 51*l.* 11*s.* in favour of the Plaintiff, which was much overdrawn before the bankruptcy of *J. S.*, without any other addition to the credit ſide of the Plaintiff's account than the check in queſtion: Held that the check in queſtion did not, under all the circumſtances of the caſe, amount to a payment for the goods by the Defendant. *Brown* v. *Kewley in Error*, *M.* 42 *Geo.* 3. *Page* 518

2. The Defendant offered to prove that on the laſt mentioned quarterly day the account between himſelf and *J. S.* was ſettled, at which time he was debited for the whole amount of the check, and credited for intereſt thereon from the day of ſettlement to the day when the bill mentioned in the check, if drawn, would have become due: Held that this evidence was not admiſſible, *id.* *ib.*

PAYMENT OF MONEY INTO COURT,

See COSTS, 4.

1. In aſſumpſit againſt a carrier for goods ſpoiled, the defendant was not allowed to pay the invoice price into Court. *Fail* v. *Pickford*, *T.* 40 *Geo.* 3. 234
2. If a plaintiff by his bill of particulars confine his demand to one count of his declaration, and defendant pay money into Court generally, the plaintiff is not at liberty to apply the money ſo paid in to any of thoſe counts on which he is precluded from giving evidence by his bill of particulars. *Holland* v. *Hopkins*, *T.* 40 *Geo.* 3. 243
3. The Court will not order money paid into Court by the Defendant through a miſtake to be reſtored to him. *Vaughan* v. *Barnes*, *E.* 41 *Geo.* 3. 392
4. Though perhaps in caſe of fraud they would, *id.* *ib.*
5. Where money is paid into Court generally upon a declaration in contract, it is an admiſſion of the exiſtence of a contract in every tranſaction which is capable of being converted into a contract by the aſſent of the parties. *Bennett* v. *Francis*, *M.* 42 *Geo.* 3. *Page* 550
6. Therefore where a Defendant who had poſſeſſed himſelf of goods belonging to the Plaintiff, and had ſold part and kept the reſidue in ſpecie, paid money into Court generally, upon a declaration containing a count for goods ſold and delivered, it was held that he had thereby admitted the tranſaction to have been converted into a contract, and that the Plaintiff was entitled to recover the value of all the goods, under the count for goods ſold and delivered, *id.* *ib.*

PEER,

See FRANKING.

PENAL ACTION,

See TIME.

PENALTY,

By articles of agreement between the Plaintiff and defendant, it was agreed on the part of the former that he ſhould pay the latter ſo much *per* week to perform at his theatres, with her travelling expences of removing from one theatre to another, except extra baggage, and on the part of the Defendant, that ſhe ſhould perform at the theatre ſuch things as ſhe ſhould be required by the Plaintiff, and attend at the theatre beyond the uſual hours on any emergency and at rehearſals, or be ſubject to ſuch fines as are eſtabliſhed at the theatres, and be at the theatre half an hour before the performances begin, and abide by the regulations of the theatres, and pay all fines, and it was agreed by both parties that "either of them neglecting to perform that agreement ſhould pay to the other 200*l.*" Aſſumpſit upon this agreement, ſtating ſeveral breaches and concluding to the Plaintiff's damage of 200*l.*: Held that the ſum mentioned in the agreement was in the nature of a penalty and not of liquidated damages. *Aſtley* v. *Weldon*, *H.* 41 *Geo.* 3. 346

PLEADING,

See ABATEMENT.
AID PRAYER, 1, 2.

Baron and feme, 1, 2, 3.
Bills of exchange, 2. 6.
Damages, 1.
Estoppel.
Insurance, 6.
Practice, 1. 10. 20. 28.
Trespass, 1.
Variance, 1, 2.

1. Bail cannot plead the bankruptcy and certificate of the principal in their own diſcharge. *Donelly* v. *Dunn*, *H.* 40 *Geo.* 3. *Page* 45

2. *A.* declared againſt *B.* and his wife, adminiſtratrix of *C.* deceaſed, "for that whereas *C.* died inteſtate, poſſeſſed of *South Sea* ſtock which ſhe held in truſt for *A.* and upon which certain dividends were due, in conſideration that *A.* at his own expence would procure adminiſtration to be granted to the wife of *B.* as next of kin to *C.* and would furniſh evidence to enable *B.* and his wife to receive the dividends; *B.* and and his wife, as ſuch adminiſtratrix, promiſed to pay over to *A.* the amount of the dividends when received:" Held that the conſideration ſtated was inſufficient to ſupport the promiſe. *Parker* v. *Baylis et ux.* *H.* 40 *Geo.* 3. 73

3. It was alſo held, that as the dividends never made part of the inteſtate's eſtate, the action againſt *B.* and his wife as *adminiſtratrix* could not be maintained, *id.* *ib.*

4. Declaration by a ſailor for wages earned "during a certain voyage, to wit, a certain voyage from the port of *London* to the coaſt of *Africa*, and from thence to the *Weſt Indies*." At the trial it appeared from the articles, that the voyage was "from the port of *London* upon an intended voyage to the coaſt of *Africa* for ſlaves, from thence to the *Weſt Indies* or *America*, and afterwards to *London* in *Great Britain*, or to her delivering port in *Europe*:" Held that the variance between the deſcription of the voyage in the declaration, and that in the articles was fatal, though the captain put an end to the voyage in the *Weſt Indies*, and diſcharged the crew there. *White* v. *Wilſon*, *H.* 40 *Geo.* 3. 116

5. And though the deſcription of the voyage in the declaration was under a *ſcilicet*, *ib.* *id.*

6. For it is not ſufficient to ſtate "a certain voyage," as the conſideration of the wages, without ſpecifying what that voyage is, *id.* *Page* 120

7. Aſſumpſit by *A.* *B.* and *C.* againſt *D.* as one of the indorſers of a promiſſory note, drawn by *E.* in favour of *C.* *D.* and (himſelf) *E.*, then in partnerſhip, and by them indorſed to *A.* *B.* and *C.* Plea in bar that *C.* one of the plaintiffs is liable as an indorſer together with *D.* and held good on ſpecial demurrer. *Mainwaring* v. *Newman*, *H.* 40 *Geo.* 3. 120

8. Aſſumpſit by ſeveral as executors; plea in bar that the promiſes were made by the defendant, together with one of the Plaintiffs, and held good on demurrer. *Moffat and others* v. *Van Millingen*, *E.* 27 *Geo.* 3. *B.* *R.* 124 *in notis.*

9. In an indictment on the 15 *Geo.* 2. *c.* 28. *ſ.* 3. it is not neceſſary to aver that the defendant is a common utterer of falſe money. *Rex* v. *Smith*, *E.* 40 *Geo.* 3. 127

10. Declaration on a policy on ſhip and goods at and from *London* to *Amſterdam*, "beginning the ſaid adventure on the ſaid goods from the loading thereof on board the ſaid ſhip;" in the policy there was a memorandum whereby the ſaid inſurance was declared to be on 15 hogſheads of tobacco, marked B. No. 51. and 65.: ſpecial demurrer, firſt becauſe the goods were not averred to have been put on board at *London*; ſecondly, becauſe the goods were not alleged to have been marked or numbered as in the memorandum but only thus, "15 hogſheads the goods, &c. in the ſaid policy mentioned;" thirdly, becauſe the Plaintiff was ſtated to have been intereſted until and at the time of the loſs, without ſhewing that he was intereſted at the time of the policy being made; fourthly, becauſe no venue was laid to the allegation of loſs on the high ſeas: *Semb.* that the declaration was bad. *De Symonds* v. *Shedden*, *E.* 40 *Geo.* 3. 153

11. If *A.* and *B.* declare upon a policy of inſurance, and aver that they were intereſted until and at the time of the loſs and it be proved that *C.*, after the policy effected but before the loſs, became a partner with *A.* and *B.* in the goods inſured; it ſeems that the variance is not fatal, for the averment of intereſt relates to the time of making

ing the policy. *Perchard* v. *Whitmore*, *Guild Hall Sittings after Mich.* 1786, *coram Buller J.* *Page* 155 *n*.

12. The Plaintiff in replevin pleaded in bar to an avowry for damage feaſance that the *locus in quo*, from time whereof, &c. ought to be open and common "on or before the 15th of *October*, when the corn was cut and carried, and from thence for a long time, to wit, for three hours and upwards," that the Plaintiff when, &c. put in his cattle "the ſame time being when the ſaid field was and ought to be open and common *as aforeſaid*:" Held that the plea was bad for uncertainty, even after verdict, the right of common being too generally deſcribed both in its commencement and concluſion. *Da Coſta* v. *Clarke*, *T.* 40 *Geo.* 3. 257

13. A declaration ſtated that in conſideration that the Plaintiff had ſold to the Defendant *a certain horſe* of the Plaintiff at and for a *certain quantity of certain oil*, to be delivered within *a certain time*, which had elapſed before the commencement of the ſuit, the Defendant promiſed to deliver the ſaid oil accordingly: Held well enough after verdict. *Ward* v. *Harris*, *T.* 40 *Geo.* 3. 265

14. In a declaration for ſlander the Plaintiff ſtated that he was a jobber or dealer in the funds, and as ſuch jobber or dealer had been accuſtomed lawfully to contract, and had from time to time lawfully contracted, &c. that the Defendant ſaid of him as ſuch jobber or dealer, "he is a lame duck," meaning that he had not fulfilled his contracts in reſpect of the ſaid ſtocks or funds, in conſequence of which divers perſons refuſed to fulfil their contracts with him (ſpecifying the contracts,) and he was prevented from fulfilling his contracts with other perſons: Held that it did not ſufficiently appear either that the words were ſpoken of lawful contracts, or that the Plaintiff was a lawful jobber or dealer in the funds; and that the declaration was therefore bad *Morris* v. *Langdale*, *M.* 41 *Geo.* 3. 284

15. *Qu.* Whether, under ſuch circumſtances it can be ſtated as ſpecial damage, that divers perſons refuſed to fulfil their contracts with the Plaintiff, ſince he might recover a compenſation by action if the contracts were lawful? *id.* *ib.*

16. Declaration that "in conſideration that the Plaintiff had taken the Defendant's goods on board his ſhip to be carried to *A.*, the Defendant promiſed to pay the money due for freight and carriage of the ſame on the delivery of the bill of lading; that the bill of lading was delivered, by reaſon whereof the Defendant became liable to pay a large ſum, to wit, 20*l.* for freight and carriage of the ſaid goods:" Held bad on demurrer, becauſe it did not appear that any thing became due for freight on the delivery of the bill of lading. *Blakey* v. *Dixon*, *M.* 41 *Geo.* 3. *Page* 321

17. *Qu.* Whether in alleging the promiſe to pay in the above caſe, the Plaintiff ſhould not have ſtated the ſpecific ſum, or have ſaid, ſo much as ſhould be reaſonably due? *id.* *ib.*

18. In an avowry Defendant averred that all thoſe whoſe eſtate he now has, &c. *from time whereof, &c.* have been accuſtomed to have, and of right *during all the time aforeſaid* ought to have had, and ſtill of right ought to have common of paſture in the *locus in quo*: Held bad, and that it did not amount to an averment of right of common at all times of the year. *Hawkins* v. *Eccles*, *H.* 41 *Geo.* 3. 359

19. If a Defendant in replevin plead by way of juſtification of the taking, that he was *poſſeſſed* of a meſſuage with common appurtenant, and that the Plaintiff's cattle were damage feaſant, on the common, and conclude in bar without praying a return, it ſeems that ſuch a plea is bad. *ib.*

20. Where three pariſh churches have been united by 22 *Car.* 2. *c.* 11. the benefice may be deſcribed in pleading as one rectory. *Wilſon*, *q. t.* v. *Van Mildert*, *E.* 41 *Geo.* 3. 394

21. The three firſt counts of a declaration in aſſumpſit againſt executors ſtated promiſes made by the teſtator, the fourth was for money had and received by the Defendants "as ſuch executors as aforeſaid," ſtating a promiſe to pay by them "executors as aforeſaid," and the laſt was upon a count ſtated by the Defendants "executors as aforeſaid," and ſtating the promiſe to pay in the ſame manner: Held bad upon gene-

ral demurrer. *Brigden* v. *Parkes*, E. 41 *Geo.* 3. *Page* 424

22. Treſpaſs for aſſault and falſe impriſonment may be laid, *diverſis diebus et vicibus.* *Burgeſs* v. *Freelove, E.* 41 *Geo.* 3. 425

23. Aſſumpſit on a note payable by inſtalments, plea in bar as to the ſaid ſeveral cauſes of action, except the laſt inſtalment, that "the ſaid ſeveral cauſes of action did not, nor did any of them accrue within ſix years:" Held on ſpecial demurer, that though ſome of the inſtalments might be barred and the others not, yet that the introduction to the plea and the body of it were inconſiſtent. *Gray* v. *Pindar, E.* 41 *Geo.* 3. 427

24. Plaintiff declared againſt Defendant as acceptor of a bill of exchange, payable to certain perſons uſing the firm of Meſſrs. *M'Brair, Watſon*, and Co.; Defendant pleaded that the ſaid Meſſrs. *M'Brair, Watſon*, and Co. had accepted ſatisfaction; Plaintiff replied that the ſaid perſons ſo as aforeſaid uſing the firm of Meſſrs. *M'Brair* and Co. (leaving out the name of *Watſon*) did not accept ſatisfaction, and concluded to the country. *Semb.* that this variance could only be taken advantage of on ſpecial demurrer. *Bell* v. *Da Coſta, E.* 41 *Geo.* 3. 446

25. Replevin of cattle taken in *A.* The Defendant avowed the taking in *A*, under a demiſe of certain premiſes of which *B.* was parcel, and becauſe the cattle were damage feaſant in *B.* he took them and drove them through *A.* in his way to the pound; and upon general demurer the avowry was held to be well pleaded. *Abercrombie* v. *Parkurſt, T.* 41 *Geo.* 3. 480

26. In an action againſt the ſheriff for an eſcape on meſne proceſs, it is ſufficient to aver that the ſheriff had not the body at the return of the writ, without negativing the appearance of the party or his putting in bail. *Stovin* v. *Perrin, M.* 42 *Geo.* 3. 561

27. If the writ iſſue from *C. B.* and the declaration for an eſcape aver that the defendant had not the body "before our ſaid Lord the King" on the return day, it is bad on ſpecial demurrer, *id.* *ib.*

28. If a demandant in a writ of right count upon the ſeiſin of his anceſtor "*in dominio ſuo ut de feodo*," omitting "*et de jure*," it ſeems to be bad. *Slade et Ux.* v. *Dowland in falſe judgment, M.* 42 *Geo.* 3. *Page* 570

29. If the Demandant in deducing his title through a female deſcribe her as "ſiſter *and heir* of *J. S.*" and it appear upon the face of the count that *J. S.* left a ſon who ſurvived his aunt, it is fatal; although it alſo appear that upon failure of iſſue of the ſon, the iſſue of the ſiſter of *J. S.* became his heir, *id.* *ib.*

POLICY,

See INSURANCE.

POST-OFFICE,

See FRANKING.

POWER,

See AUTHORITY.

PRACTICE,

See AFFIDAVIT TO HOLD TO BAIL.
AMENDMENT,
ATTORNEY.
BAIL.
COSTS.
ESCAPE, 2.
INTEREST OF MONEY, 1.
LUNATIC, 1.
OYER.
PAYMENT OF MONEY INTO COURT.
PRISONER.
PROCESS, 2.
STAYING AND SETTING ASIDE PROCEEDINGS.
VENUE.
WARRANT OF ATTORNEY.

1. The Court will allow *non eſt factum* and uſury to be pleaded together to debt on bond. *Lechmere* v. *Rice, M.* 40 *Geo.* 3. 12

2. Copy of a writ againſt *William Armytage*; notice to appear "*Catherine Waller* you are ſerved, &c.;" miſtake held fatal. *Jones* v. *Armytage, M.* 40 *Geo.* 3. 38

3. If bail be brought up on the ſame day on which an attachment has been obtained againſt the ſheriff, the Court will permit them to juſtify, and ſet aſide the attachment

ment on payment of Coſts. *Turner* v. *Briſtow, M.* 40 *Geo.* 3. *Page* 38

4. In *C. B.* notice of declaration is not neceſſary in bailable actions. *Holen* v. *Bargus, M.* 40 *Geo.* 3. 42

5. If two attornies' clerks be put in as bail, the Plaintiff may treat ſuch bail as a nullity, and take an aſſignment of the bail bond. *Wallace* v. *Arrowſmith, M.* 40 *Geo.* 3. 49

6. If a Plaintiff, after entering up judgment for himſelf upon two counts, diſcover an error in one of them, he may wave his judgment on that count, and enter it for the Defendant. *Spicer* v. *Teaſdale, M.* 40 *Geo.* 3. *ib.*

7. Service of a declaration in ejectment on the wife of the tenant in poſſeſſion is ſufficient. *Doe ex dem. Baddam* v. *Roe, M.* 40 *Geo.* 3. 55

8. The Court of *C. B.* will refer a bill of exchange to the Prothonotary, to compute principal, intereſt, *exchange, re-exchange* and coſts. *Goldſmid and others* v. *Taite and another, M.* 40 *Geo.* 3. *ib.*

9. But not to compute charges and expences. *ib.*

10. The Court will not allow *non-aſſumpſit* and alien enemy to be pleaded together. *Thyatt* v. *Young, H.* 40 *Geo.* 3. 72

11. *Affidavit* of ſervice of a declaration in ejectment made by a perſon who ſaw the declaration ſerved, and heard it explained to the tenant in poſſeſſion, is ſufficient to entitle the Plaintiff to judgment againſt the caſual ejector. *Goodtitle ex dem. Wanklin* v. *Badtitle, H.* 40 *Geo.* 3. 120

12. The Defendant being arreſted on a writ returnable the laſt return of *Michaelmas* Term, put in bail on the laſt day of that term, who juſtified on the firſt day of *Hilary* term; a declaration was delivered on the the third day of *Hilary* term, and in the ſame term judgment was ſigned for want of a plea: Held regular, the Defendant not being entitled to an imparlance. *Bailey* v. *Huntler, H.* 40 *Geo.* 3. 126

13. The allowance of a writ of error may be ſerved before the Plaintiff is entitled to ſign final judgment. *Payne* v. *Whaley, E.* 40 *Geo.* 3. 137

14. If the writ by which a replevin is removed be returnable on the firſt return of the term, and the Plaintiff do not declare within four days before the end of that term, the Defendant is entitled to an imparlance, though he has not appeared within the term.—*Thompſon* v. *Jordan, E.* 40 *Geo.* 3. *Page* 137

15. If iſſue be joined on one of three pleas, and judgment be entered by default upon the two others, the Plaintiff cannot execute a writ of inquiry on thoſe pleas on which he has judgment, but muſt award jury proceſs *tam ad triandum quam ad inquirendum. Dicker* v. *Adams, E.* 40 *Geo.* 3. 163

16. When the Plaintiff enters an appearance for the Defendant under the ſtatute, judgment may be ſigned without any demand of a plea. *North* v. *Lambert, T.* 40 *Geo.* 3. 218

17. A *capias ad reſpondendum* againſt bail was teſted of a day, prior to the return of the *ca. ſa.* againſt the principal, but was not in fact ſued out till afterwards: Held regular. *Pinero* v. *Wright, T.* 40 *Geo.* 3. 235

18. If a Defendant be holden to bail under a judge's order, a material fact being concealed from the judge which would probably have induced him to refuſe the order; the Court will on application diſcharge the Defendant, even though there was a ſufficient *affidavit* of debt, independent of the order. *Davies* v. *Chippendale, M.* 41 *Geo.* 3. 282

19. But they will not diſcharge him from a detainer lodged againſt him by a third perſon while in cuſtody under the judge's order. *ib.*

20. To a replication of *nul tiel record* and day given, if the Defendant demur, the Plaintiff need not join in demurrer, but if the record is not produced may ſign judgment. *Tipping* v. *Johnſon, M.* 41 *Geo.* 3. 302

21. If the Defendant's attorney admit in effect, though not in terms, that a writ of error ſued out by him has been brought for delay, the Plaintiff is at liberty to proceed on the judgment. *Miller* v. *Couſins, M.* 41 *Geo.* 3. 329

22. A joinder in demurrer muſt be ſigned by a ſerjeant. *Brooker* v. *Simpſon*, *M.* 41 *Geo.* 3. *Page* 336

23. If the rule of allowance of bail be not ſerved on the Plaintiff's attorney, he may take an aſſignment of the bail bond, though he knows of the juſtification. *Holland* v. *White*, *M.* 41 *Geo.* 3. 341

24. If a declaration be indorſed "to plead in ——," it muſt be underſtood to mean within the number of days allowed by the rules of the Court. *Hifferman* v. *Langelle*, *H.* 41 *Geo.* 3. 363

25. A writ of error operates as a *ſuperſedeas* from the time of the allowance though it be not ſerved till after execution. *Meagher* v. *Vandyck*, *H.* 41 *Geo.* 3. 370

26. The rule that final judgment cannot be ſigned till four days after the return of the *habeas corpora juratorum* does not extend to the caſe where the term cloſes before the four days are expired. *Thomas* v. *Ward*, *E.* 41. *Geo.* 3. 393

27. If a Defendant being arreſted upon proceſs in *K. B.* give a warrant of attorney to confeſs judgment, and be afterwards holden to bail in *C. B.* in an action upon that judgment, the Court will diſcharge him upon a common appearance. *Salkeld* v. *Lands*, *E.* 41 *Geo.* 3. 416

28. A Defendant who is under terms to plead iſſuably, is not at liberty to take advantage of any objections upon ſpecial demurrer, of which he could not have availed himſelf upon general demurrer. *Bell* v. *Da Coſta*, *E.* 41 *Geo.* 3. 446

27. If *A.* agree to buy of *B.*, and *B.* to ſell to *A.*, goods at a certain price, to be delivered between ſuch a day and ſuch a day, and *B.* fail to deliver the goods within the time; it is ſufficient for *A*, in declaring on the contract to aver, that he was during all the time and ſtill is ready and willing to receive and pay for the goods, without making any allegation of an actual tender and refuſal.. *Waterhouſe* v. *Skinner*, *E.* 41 *Geo.* 3. 447

28 The Defendant in replevin having averred in his cognizance that the Plaintiff held the land under "a certain demiſe to him the ſaid *J. L.*, (the Plaintiff) theretofore made." The Plaintiff pleaded in bar that he did not hold under a demiſe in manner and form. Upon this Defendant obtained an order to amend, by ſtriking out the words "to him the ſaid *J. L.*" with liberty to the Plaintiff to plead *de novo*, and that in caſe the Plaintiff ſhould plead new matter, the Defendant ſhould pay all the coſts of the amendment. The Defendant having amended accordingly, the Plaintiff demurred ſpecially, and aſſigned for cauſe that it did not appear to whom the demiſe was made: Held that the demurrer was not new matter. *Lees* v. *Warlters*, *T.* 41 *Geo.* 3. *Page* 465

29. In an action of treſpaſs, directed by the Lord Chancellor to try a queſtion of bankruptcy, the court of *C. B.* will not reſtrain the Defendant from pleading the general iſſue, together with ſpecial juſtifications. *M'Connell* v. *Hector*, *M.* 40 *Geo.* 3. 549

PREMIUM,

See INSURANCE, 1, 2.

PREROGATIVE,

See AUTHORITY, 3.

PRISONER,

See EXECUTION, 1.
HABEAS CORPUS, 1, 2.

1. The Court will not diſcharge a Defendant out of cuſtody on the ground of the *affidavit* of the delivery of the declaration not having been filed within 20 days of the delivery, if it be by way of detainer. *Davis* v. *Davenport*, H. 40 *Geo.* 3. 72

2. If a priſoner be prevented from juſtifying bail by the Plaintiff deſiring further time to enquire into their ſufficiency, he is from the time of his notice of juſtification entitled to a demand of a plea before judgment can be ſigned againſt him. *Davies* v. *Chippendale*, *H.* 41 *Geo.* 3. 367

PRISONER AT WAR,

See COSTS, 5.

PRIVILEGE,

See FRANKING.

PRO-

PROCEEDINGS, STAYING AND SETTING ASIDE,

See STAYING AND SETTING ASIDE PROCEEDINGS.

PROCESS,

See AMENDMENT, 1.
EXTORTION, 1.
PRACTICE, 2. 15.
TIME, 1.

1. The day inſerted in a notice to appear to a common *capias* muſt be the return day of the writ. *Ruſhton* v. *Chapman*, *M.* 41 *Geo.* 3. *Page* 340

2. The Court will not ſet aſide proceedings and order the bail bond to be delivered up, becauſe a Defendant has been arreſted on a ſpecial *capias*, in which, as well as in the affidavit to hold to bail, the initials only of his Chriſtian name were inſerted. *Howell* v. *Coleman*, *T.* 41 *Geo.* 3. 466

PROMISSORY NOTE,

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

R.

RACE,

See WAGER, 1.

RECOGNIZANCE,

See AMENDMENT, 2.
BAIL, 5, 6, 7.

RECOVERY,

See COMMON RECOVERY.

RECTORY,

See PLEADING, 20.

REGISTER,

See SHIP, 1.

REPLEVIN,

See PRACTICE, 14.
PLEADING, 25.

RETURN OF WRITS,

See TIME, 1.

REVENUE,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

RIGHT, WRIT OF

See AID-PRAYER, 1, 2.
PLEADING, 28, 29.

ROMAN CATHOLICS,

See FRANKING.

S.

SALE,

See FRAUDS, STATUTE OF, 1, 2.

SCIRE FACIAS,

See AMENDMENT, 2.

SAILOR,

See WAGES, 1, 2.

SEA-SHORE,

1. *Primâ facie* every ſubject has a right to take fiſh ſound upon the ſea-ſhore between high and low water mark. *Bagott* v. *Orr*, *T.* 41 *Geo.* 3. *Page* 472

2. But ſuch general right may be abridged by the exiſtence of an excluſive right in ſome individual, *id.* *ib.*

3. *Quere*, If there be a *primâ facie* right in every ſubject to take fiſh ſhells found on the ſea-ſhore between high and low water mark? *id.* *ib.*

SERVICE,

See PRACTICE, 7. 11.

SHERIFF,

See ESCAPE, 1, 2.
PLEADING, 26, 27.
PRACTICE, 3.

SHIP,

See WAGES, 1, 2.

1. A foreign built ſhip *Britiſh*-owned is not required to be regiſtered. *Long* v. *Duff*, *T.* 40 *Geo.* 3. 209

2. Such a ſhip may therefore ſail without convoy, being within the exception of the convoy act 38 *Geo.* 3. *c.* 76. *ſ.* 6. *id.* *ib.*

SLANDER,

See PLEADING, 14, 15.

STAMPS,

See EVIDENCE, 7.

1. A mere cognovit need not be ſtamped. *Ames* v. *Hill*, *E.* 40 *Geo.* 3. 150

2. But if it contain any terms of agreement it muſt, *id.* *Page* 150

3. An agreement to confeſs judgment for 30*l.* to ſecure 5*l.* and coſts, is not an agreement for more than 20*l.* within the 23 *Geo.* 3. *c.* 58. *ſ.* 4. and therefore need not be ſtamped, *id.* *ib.*

4. An unſtamped draft drawn on *A. B.* bricklayer is not within the exception of 23 *Geo.* 3 *c.* 49. *ſ.* 4. in favour of drafts drawn on perſons acting as bankers within ten miles of the place where the draft is drawn. *Caſtleman* v. *Roy*, *E.* 41 *Geo.* 3. 383

5. A written agreement for the ſale of all the hops which ſhall be grown upon a certain number of acres of land, to be delivered in pockets at a certain place, cannot be given in evidence unleſs ſtamped with an agreement ſtamp; ſuch an agreement not being within the exception in the 23 *Geo.* 3. *ſ.* 4. reſpecting agreements for the ſale of goods, wares, and merchandizes. *Waddington* v. *Briſtow*, *T.* 41 *Geo.* 3. 452

STATUTES CITED OR COMMENTED UPON,

HEN. III.

52. *c.* 9. (Statue of *Marlbridge*) 272

EDW. I.

6. *c.* 5. (Statute of *Gloceſter* Waſte) 86

HEN. VI.

23. *c.* 9. (Bail bond.) 36. 111

HEN. VIII.

21. *c.* 19. *ſ.* 3. (Coſts) 376
23. *c.* 15. (Coſts) 253
34 & 35. *c.* 4. (Bankrupt) 9 *n.*

EDW. VI.

5 & 6. *c.* 5. (Hops) 180

ELIZ.

13. *c.* 7. *ſ.* 1. (Bankrupt) 2. 9. *n.*
— *c.* 10. (Reſtraining Statute) 189. 198
29. *c.* 4. (Extortion) 157

JAC. I.

1. *c.* 15. *ſ.* 6. (Bankrupt) 3. 9 *n.*
3. *c.* 8. (Bail in Error) 443
21. *c.* 19. *ſ.* 14. (Bankrupt) 2. 9. *n.*

CAR. II.

12. *c.* 18. (Navigation Act) *Page* 212
13 & 14. *c.* 11. *ſ.* 6. (Foreign ſhips *Engliſh* owned) 213
15. *c.* 7. *ſ.* 6. (*Engliſh* ſhipping) 213
16. *c.* 7. (Gaming) 53
16 & 17. *c.* 8. *ſ.* 3. (Bail in Error) 444
22. *c.* 11. *ſ.* 63. (Churches) 394
29. *c.* 3. *ſ.* 17. (Statute of Frauds) 238
30. *Stat.* 2. (Papiſts) 140. *et ſeq.*
31. *c.* 2. (Habeas Corpus) 531

WILL. AND MARY,

7 & 8. *c.* 22. (*Engliſh* ſhipping) 213

WILL. III.

8 & 9. *c.* 11. *ſ.* 2. (Coſts) 253
9 & 10. *c.* 15. (Arbitration) 445
9 & 10. *c.* 17. (Bills of Exchange) 82

ANNE.

3 & 4. *c.* 9. (Promiſſory Notes) 82. 415
4. *c.* 16. *ſ.* 5. (Coſts) 368
——— *ſ.* 11. (Dilatory Pleas) 384
4. *c.* 17. (Bankrupt) 9. *n.*
5. *c.* 22. *ſ.* 1. (Bankrupt) 3. 9. *n.*
——— *ſ.* 2. 7
9. *c.* 14. (Gaming) 52, 53

GEO. I.

3. *c.* 12. (Bankrupt) 7
5. *c.* 24. (Bankrupt) 7. 9 *n.*
7. *c.* 31. *ſ.* 1. (Bankrupt) 2. 5

GEO. II.

2. *c.* 23. Attorney's Bill) 343
— *c.* 36. (Ships' Articles) 116
5. *c.* 27. *ſ.* 4. (Proceſs) 38
— *c.* 30. *ſ.* 7. (Bankrupt) 2. 5
——— *ſ.* 27. 4.
——— *ſ.* 41. 4. 5
7. *c.* 8. (Stock Jobbing) 287
13. *c.* 19. (Horſe Racing) 51
15. *c.* 28. *ſ.* 3. (Counterfeit Money) 127
18. *c.* 34. *ſ.* 11. (Horſe Racing) 51
19. *c.* 32. *ſ.* 2. (Bankrupt) 4. 5
23. *c.* 33. *ſ.* 19. (County Court) 29
24. *c.* 44. (Copy Warrant) 158
32. *c.* 28. *ſ.* 11. (Extortion) 88

GEO. III.

3 & 4. *c.* 68. (Ship's Regiſtry) *Page* 217
4. *c.* 24. (Franking) 140. *et ſeq.*
12. *c.* 47. *ſ.* 2. (Bankrupt) 10. 2. 5
14. *c.* 77. *ſ.* (Bankrupt) 10
19. *c.* 32. (Bankrupt) 398
23. *c.* 49. *ſ.* 4. (Stamps) 383
23. *c.* 58. *ſ.* 4. (Stamps) 150. 452
24. *c.* 44. *ſ.* 6. (Demand of a Copy of Warrant) 39
24. *S.ſſ* 2. *c.* 37. (Franking) 142
26. *c.* 60. (Ship's Regiſtry) 211. *et ſeq.*
27. *c.* 19. *ſ.* 8. (Ship's Regiſtry) 215
31. *c.* 32. (Franking) 141
35. *c.* 53. *ſ.* 1, 2, 3. (Franking) 142
37. *c.* 45. (Bank Act) 48. 526
37. *c.* 73. *ſ.* 3. (Seamen's Wages) 57
37. *c.* 144. Private Acts (Croydon Incloſure) 89
38. *c.* 50. *ſ.* 9. (Aliens) 363
38. *c.* 76. *ſ.* 6. (Convoy Act) 209
39 & 40. *c.* 104. (Court of Requeſts) 588

STAYING AND SETTING ASIDE PROCEEDINGS.

1. If *A.* and *B.* having recovered in ſeparate actions for libels againſt different parties engaged in the management and publication of the ſame newſpapers, commence freſh actions againſt the ſame parties, each ſuing that party againſt whom the other has recovered, the Court will not interfere in a ſummary way to ſet aſide the latter proceedings. *Martin* v. *Kennedy*, *H.* 40 *Geo.* 3. 69
2. The Court will not ſtay proceedings in an action, on the ground of a bill depending in Chancery for the ſame cauſe. *Murphy* v. *Cadell*, *E.* 40 *Geo.* 3. 137
3. When only two of three joint contractors are ſued, the Court will not ſtay proceedings upon the bail bond, unleſs the defendants undertake not to plead in abatement. *Govett* v. *Johnſon*, *T.* 41 *Geo.* 3. 465
4. The Court will not ſet aſide proceedings, and order the bail bond to be delivered up, becauſe a Defendant has been arreſted on a ſpecial *capias*, in which, as well as in the affidavit to hold to bail the initials only of his Chriſtian name were inſerted. *Howell* v. *Coleman*, *T.* 41 *Geo.* 3. 466

STOCK-JOBBING,

See PLEADING, 14, 15.

STOPPAGE IN TRANSTU,

A. living at *N.* in *Devonſhire*, ordered goods of *B.* in *London*, who ſent them by ſhip *v â Exeter*, conſigned to *A.*, and adviſed him thereof; on their arrival at *Exeter* they were delivered to *C*, a wharfinger, who received them on *A.*'s account and paid the freight and charges; after their arrival *A.* wrote to *B.* informing him that in conſequence of his affairs being deranged he ſhould not take the goods, and telling him that they were at *Exeter*; at this time *A.* had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt; *B.* applied to *C.* for the goods, and tendered him the freight and charges due, upon which *C.* promiſed not to deliver them out of his cuſtody, but afterwards did deliver them to the aſſignees of *A.* though indemnified by *B.*: Held, 1ſt. that *B.* had a right to ſtop the goods in the hands of *C.*; and, 2dly, that he might maintain trover for them againſt *C.* *Mills* v. *Ball*, *T.* 41 *Geo.* 3. *Page* 457

SUGGESTION,

See COURTS, 1.

SUPERSEDEAS,

See PRACTICE, 25.

SURETY,

See CONTRIBUTION.

T

TENDER,

Bank notes are not made legal tender by the 37 *Geo.* 3. *c.* 45. *Grigby* v. *Oakes*, *M.* 42 *Geo.* 3. 526

TIME,

In a penal action a *capias ad reſpondendum*, iſſued within a year after the offence committed, but was never ſerved on the Defendant or returned; after the expiration of the year, but in the ſame term a *capias per conti-*

continuance iſſued, and was duly ſerved and returned; the declaration was of the term in which both writs iſſued: Held that the firſt writ not having been returned could not be connected with the ſecond ſo as to ſupport the action. *Stanway q. t. v. Perry, E.* 40 *Geo.* 3. *Page* 157

TITHES,

1. Hops are by law titheable after they are picked from the bind. *Knight* v. *Halſey in Error, E.* 40 *Geo.* 3. 172
2. And no uſage can vary this rule, *id. ib.*
3. No evidence is ſufficient to ſupport a real compoſition, unleſs it have ſome reference to a deed of compoſition, *id. ib.*

TOLL,

See MORTGAGE, 1.

TOWING-PATH,

See INCLOSURE ACT.

TRESPASS,

See DAMAGES, 1.
JUDGMENT 1.
TRESPASS, 22.

A private perſon may juſtify breaking and entering the houſe of another, and impriſoning his perſon in order to prevent him from committing murder on his wife. *Hancock.* v. *Baker, T.* 40 *Geo.* 3. 260

TROVER,

See STOPPAGE IN TRANSITU.

1. *A.* entruſted *B.* with goods to ſell in *India*, agreeing to take back from *B.* what he ſhould not be able to ſell, and allowing him what he ſhould obtain beyond a certain price, with liberty to ſell them for what he could get if he could not obtain that price. *B.* not being able to ſell the goods in *India* himſelf, left them with an agent to be diſpoſed of by him, directing the agent to remit the money to himſelf in *England*: Held that *A.* could not maintain trover againſt *B.* for the goods. *Bromley* v. *Coxwell, E.* 41 *Geo.* 3. 438
2. *A.* having agreed to purchaſe of *B.* the remainder of a term, the latter delivered to him the leaſe in order to get an aſſignment made out; *A.* then obtained an enlargement of the term from the original landlord, and refuſed to accept an aſſignment or pay the full price agreed on, becauſe *B.*'s undertenant had removed ſome fixtures: Held that *B.* might inſiſt on *A.* accepting the aſſignment, and after demand and refuſal of the leaſe might maintain trover for it. *Parry* v. *Frame, T.* 41 *Geo.* 3. *Page* 451

TURNPIKES,

See MORTGAGE, 1.

TYTHES,

See TITHES.

V.

VARIANCE,

See AMENDMENT, 1.
INSURANCE, 6.
PLEADING, 4, 5, 6. 11. 24.
PRACTICE, 2.

1. An agreement entered into between *A.* and *B.* reſpecting a horſe race was indorſed "*N. B.* to ſtart p. p. 15 days from this date." In a declaration on this agreement no notice was taken of the indorſement; and no evidence was given at the trial to explain the meaning of the letters "p. p." The Court after verdict held that the variance between the agreement declared on and that given in evidence was not material, the letters "p. p." being inſenſible. *Whaley* v. *Pajot, M.* 40 *Geo.* 3. 51
2. In an action for non-reſidence the pariſh was ſtyled in the declaration *St. Ethelburg*; evidence was given that the real name was *St. Etheburga*: Held a fatal variance. *Wilſon, q. t.* v. *Gilbert Clerk, M.* 41 *Geo.* 3. 281
3. If the writ be that the Defendant anſwer in "a certain plea of treſpaſs on the caſe on promiſes," and the declaration be in debt for goods ſold and delivered, and money borrowed, the Court will diſcharge the Defendant on entering a common appearance. *Kerr* v. *Sheriff, H.* 41 *Geo.* 3. 358

VENUE,

See PLEADING, 10.
USURY, 2.

1. Taking out a ſummons for a further time to plead is no waver of the Defendant's right to move to change the venue. *Wilſon* v. *Harris*, *M.* 41. *Geo.* 3. *Page* 320

2. It ſeems the Court will not change the venue in an action on an award, even though the declaration contain the common counts. *Whitburn* v. *Staines*, *H.* 41 *Geo.* 3 *Page* 355

3. Nor will they oblige the Plaintiff to undertake to give evidence on the count upon the award. *ib.*

VERDICT,

See INSURANCE, 7.

U.

USAGE,

See TITHES, 1, 2.

USE AND OCCUPATION.

See COURTS, 2.

USURY.

1. *A.* lent *B.* 500 *l.*, and at the time of the loan it was agreed that the latter ſhould give ſomething more than legal intereſt as a compenſation, but no particular ſum was ſpecified. After the execution of the deed *B.* gave *A.* 50 *l.* and paid intereſt at the rate of 5 *per cent.* on the 500 *l.* for five years, at the end of which time an action was brought againſt *A.* for uſury: Held that the action was not barred by lapſe of time, for that the loan was ſubſtantially for no more than 450 *l.*, and conſequently the intereſt at the rate of 5 *per cent.* on the 500 *l.* received within the laſt year was uſurious. *Scurry*, *q. t.* v. *Freeman*, *E.* 41 *Geo.* 3. 381

2. If a draft be given for uſurious intereſt and a receipt taken for it in the county of *A.* and the draſt be afterwards exchanged for money in the county of *B.* the uſury is committed in the county of *B.*, and the venue muſt be laid there, *id.* *ib.*

W.

WAGES.

1. The 37 *Geo.* *c.* 73. *ſ.* 3. having prohibited more than double monthly wages, being given to ſeamen coming from the *Weſt Indies*, unleſs the captain be ſpecially licenſed to give a greater rate by the chief officer of the port; a general licence by ſuch chief officer to a captain "to procure men on ſuch terms as he can," is void. *Rogers* v. *Lacy*, *H.* 40 *Geo.* 3. *Page* 57

2. A ſailor in addition to the wages contained in the ſhip's articles, ſued for the average price of a negro ſlave, for which he had agreed with the captain, though no mention of ſuch perquiſite was made in the articles: Held that the contract for the average price of a negro ſlave was void; ſuch additional perquiſite being in fact wages, and therefore only to be recovered where included in the articles according to 2 *Geo.* 2. *c.* 36. *White* v. *Wilſon*, *H.* 40 *Geo.* 3. 116

WAGER,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

No action will lie on a wager, though above 50 *l.*, that a ſingle horſe ſhall run on the high road from *A.* to *B.* and arrive ſooner than one of two horſes placed at any diſtance the owner ſhall pleaſe; ſuch a race not being legalized by the 13 *Geo.* 2. *c.* 19, and 18 *Geo.* 2. *c.* 34. *ſ.* 11. *Whaley* v. *Pajot*, *M.* 40 *Geo.* 3. 51

WARRANT,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.
OFFICER, 1, 2.

WARRANTY,

See CARRIER, 1.

WARRANT OF ATTORNEY,

See EVIDENCE, 2.
PRACTICE, 27.

WASTE.

1. In an action of waſte, on the ſtatute of *Gloceſter*, againſt tenant for years for converting three cloſes of meadow into garden ground, if the jury give only one farthing damages for each cloſe, the Court will permit the Defendant to enter up judgment for himſelf. *The Keepers and Governors, &c. of Harrow School* v. *Alderton*, *H.* 40 *Geo.* 3. 86

2. And this principle holds whether the waſte conſiſt in the alteration of the property, or in the deterioration of it, *id.* *Page* 86

WAVER,

See PRACTICE, 6.
VENUE, 1.

WAYS,

See INCLOSURE ACT.

WEST INDIES,

See WAGES, 1.

WITNESS,

See EVIDENCE, 3.

WRIT,

See ABATEMENT, 1, 2.

THE END OF THE SECOND VOLUME.

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